SUPREME COURT OF THE UNITED STATES.

No. [illegible]

JOSEPH C. WILLARD, APPELLANT,

vs.

BENJAMIN O. TAYLOR.

SUPREME COURT OF THE UNITED STATES.

No. 328.

JOSEPH C. WILLARD, APPELLANT,

vs.

BENJAMIN O: TAYLOE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Certificate	a	1
Bill	1	1
Answer	31	14
Replication	43	19
Testimony for orator	44	19
Petition and bill of complaint of Henry A. Willard	127	56
Testimony for defendant	139	61
Answer of defendant to petition of H. A. Willard	152	67
Hearing and decree	154	68
Appeal bond by Joseph C. Willard	155	69

a In the supreme court of the District of Columbia, December 8, 1865.

JOSEPH C. WILLARD
vs.
BENJAMIN O. TAYLOE. } No. 207.—Equity.

DISTRICT OF COLUMBIA, *to wit:*

I, Return J. Meigs, clerk of the said supreme court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and remaining of record in my office, and that the said originals constitute the entire proceedings of the said supreme court in the above-entitled cause.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at office, in the city of Washington, this eighth day of December, 1865, and 90th year of the independence of the United States.

[SEAL.] R. J. MEIGS, *Clerk.*

1 Supreme court of the District of Columbia, in equity.

JOSEPH C. WILLARD
vs.
BENJAMIN O. TAYLOE. } No. 207.

To the honorable the justices of the supreme court of the District of Columbia, in equity sitting:

Joseph C. Willard, a resident of the city of Washington, in the District of Columbia, brings this his bill of complaint against Benjamin O. Tayloe, a resident of the same city and District. And thereupon your orator complains and says, that on or about the 12th day of April, 1854, the said Benjamin O. Tayloe, whom your orator prays may be made a party defendant to this bill of complaint, being or then pretending to be seized and possessed of, or otherwise well entitled to, a certain piece or parcel of land situate in the aforesaid city of Washington, fronting about one hundred feet on Pennsylvania avenue, between 14th and 15th streets, in said city, and running back by about the same number of feet in depth to an alley, and which then was and still is generally called and known as the "Mansion House" property, but which on the plat or ground plan of said city is more particularly distinguished and known as lots numbered respectively four (4) and five (5), in square numbered two hundred and twenty-five, (sq. 225,) leased the said piece or parcel of land,
2 together with the buildings and appurtenances therein belonging, unto your orator, for the term of ten years, to commence on the 1st day of May, 1854, for which your orator was to pay an annual rent of $1,200 in equal quarterly payments; and at the same time agreed with your orator, that he your said orator, should have the right or option of purchasing the said piece or parcel of land, together with all the buildings and improvements thereon, absolutely and in fee simple, at any time before the expiration of the aforesaid

and as yet continuing lease, on your orator's paying, or securing to be paid, therefor the sum of $22,500, as follows: two thousand dollars thereof in cash, and two thousand together with the interest on all the deferred instalments, in each and every year thereafter until the whole should be paid; and further agreed with your orator that the said deferred payments should be secured by a deed of trust on the said property, and that on your orator's fully paying and securing the purchase money as aforesaid, a good warranty deed for the said land and premises should be given to him and his heirs or assigns by the said defendant, except only as to the yearly rent of $390, then (and still) existing against the said property, and subject to which it was agreed between the defendant and your orator that the said warranty deed should be made; and that your orator accepted the aforesaid
3 lease with the agreements and stipulations therein contained or therewith connected as aforesaid. And in order to perfect the said lease, and carry into execution the aforesaid agreements, the said defendant and your orator procured an indenture or instrument of writing to be drawn up, which purports to be a lease; and the same indenture was, in due form of law, signed, sealed, acknowledged, and delivered on the aforesaid 12th day of April, 1854, by the said defendant and your orator, and was shortly afterwards duly recorded amongst the land records for Washington county in the District of Columbia, as by the said instrument of writing marked Exhibit J. C. W., No. 1.

Exhibit J. C. W., No. "1."

This agreement, made the 12th day of April, 1854, between Benjamin O. Tayloe of the first part, and Joseph C. Willard of the second part, both of the city of Washington and District of Columbia, witnesseth: The said Benjamin O. Tayloe doth hereby demise, lease, and to farm let unto the said Joseph C. Willard, all that lot or parcel of land situate and being in said city, and fronting between 14th and 15th streets on Pennsylvania avenue, about one hundred feet by about the same number of feet in depth to an alley, being the same property now occupied by David Rowland, and generally called and known
4 as the Mansion House, to have and to hold the same unto the said Joseph C. Willard, his executors or assigns, for and during the full term of ten years, commencing with the first day of May next, yielding and paying therefor unto the said Benjamin O. Tayloe, his heirs or assigns, the just and full annual rent of twelve hundred dollars in equal quarterly payments; in default of payment whereof the said property is to be subject to the right of distress for the rent in arrear; and the said Benjamin O. Tayloe, his heirs or assigns, shall have the full right to re-enter and repossess the said premises as if this contract was hereby annulled. It is hereby also agreed that the said Joseph C. Willard, his executors or assigns, shall have the right or option to purchase the above-described lot or piece of ground, together with all the buildings and improvements thereon, at any time before expiration of the lease aforesaid, on paying, or securing to be paid, for the same the sum of twenty-two thousand five hundred dollars

payable as follows, two thousand thereof in cash, and two thousand, together with the interest on all the deferred instalments, in each and every year thereafter, till the whole is paid; the deferred payments to be secured by a deed of trust on the property. And a good warranty deed is to be given to the said Willard, his heirs or assigns, except only as to the yearly ground rent of three hundred and ninety——
5 dollars, now existing against the said property, and subject to which it is understood the said deed is to be made. And the said Joseph C. Willard doth hereby covenant and agree to and with the said Benjamin O. Tayloe, that he will pay the rent aforesaid when and as the same shall fall due; that he will keep the said premises in good and reasonable repair, and should he not think proper to avail himself of the privilege of purchasing hereinbefore stipulated for, that at the expiration of the said term he will surrender the said premises to the said Benjamin O. Tayloe his heirs or assigns, in as good condition as they are now in, reasonable wear and tear and accidents only excepted.

And it is mutually agreed between the said parties that the said Willard is to have the right to put, erect, and build any houses, tenements, or other structures he may think proper upon the said premises, during the lease aforesaid, and in order to do so to advantage may pull down and remove the buildings now upon the ground, and make use of the materials thereof in the construction of the new improvements.

In witness whereof, the parties aforesaid have hereunto set their hands and seals, the day and year first above written.

BENJ. OGLE TAYLOE. [SEAL.]
J. C. WILLARD. [SEAL.]

Signed, sealed, and delivered in presence of us—
N. CALLAN.
F. S. MYER.

6 DISTRICT OF COLUMBIA, *County of Washington, sct:*

We, Neeles Callan and F. S. Myer, justices of the peace in and for the county aforesaid, in the district aforesaid, do hereby certify that Benjamin O. Tayloe and Joseph C. Willard, parties to a certain deed bearing date the 12th day of April, 1854, and hereto annexed, personally appeared before us, in our county aforesaid, the said Benjamin O. Tayloe and Joseph C. Willard being personally well known to us as the persons who executed the deed aforesaid, and acknowledged the same to be their act and deed.

Given under our hands and seals this twenty-eighth day of April, A. D. 1854.

N. CALLAN, *J. P.* [SEAL.]
F. S. MYER, *J. P.* [SEAL.]

And the indorsement thereon herewith filed, and which your orator herewith prays may be taken as part of this bill of complaint, will more fully appear. And in further execution of the aforesaid lease,

the said defendant put your orator in possession of the aforesaid land and premises, and the same have ever since remained in his possession, or in the possession of his tenants or agents. Your orator further says that on the aforesaid 12th day of April, 1854, he
7 was interested as owner, or part owner, in other property situate and lying in square numbered 225, as aforesaid, and hoped and expected, at no distant day, to be able to extend, as he greatly desired to do, his ownership in said square, and that a controlling inducement to his acceptance of the land and premises hereinbefore described on a lease of ten years, at an annual rent of $1,200, payable as aforesaid, was the privilege or right which he thereby, and in virtue of the agreements therein contained, acquired and secured of purchasing the said land and premises for the sum of $22,500, at any time before the expiration of the said lease, although the said last-mentioned sum of money was, in the opinion of your orator, largely in excess of the then value of the said land and premises, and in excess, too, of any value which most persons would then have thought could attach thereto at any time within the period through which his said right of purchase was to extend. Further, your orator says, that resting securely on the validity of his said right to purchase, never thinking that it could or would be seriously challenged or questioned by any one, intending always to avail himself thereof within the time allowed for its exercise under the agree-
8 ment aforesaid, and never for a moment supposing that the defendant, whom your orator had ever highly regarded and respected, as a man of unblemished honor and stainless reputation, would fail or hesitate to carry out and specifically perform his part of the aforesaid agreement, he, your orator, has indirectly, but materially enhanced the value of the aforesaid land and premises, whilst the same have been in his possession under the lease aforesaid, by the very large expenditures which he has made of money and credit, in purchasing and improving other property in the immediate neighbourhood and located in the same square; and whilst the enhanced value thus indirectly given by your orator to the said land and premises is, doubtless, appreciable by all who know the property, still it is, as your orator believes, worth more to him than to any other person, first on account of its proximity to other valuable property, commonly known as "Willards' Hotel," in which your orator is interested as part owner, next, on account of plans already formed and intended to be carried out by your orator, for the improvement of the said land and premises, and, lastly, because, relying on his equitable ownership thereof, and intending in due time to acquire the legal title thereto, your orator has, as he supposed he
9 well and properly might do, demised and let portions of said land and premises, and would be subjected to damage and loss were his said demises or lettings to be vacated or disturbed.

Further, your orator says, that on the 15th day of the current month of April, 1864, he, to perfect his purchase of the aforesaid land and premises, and being then ready, and then, as theretofore and now, anxious to specifically and in good faith carry out and

perform his part of the aforesaid agreement, and to avail himself of his right to purchase thereunder the aforesaid land and premises, and fully hoping to find the defendant also ready and willing on his part to specifically perform the said agreement, sent his check to the said defendant for the sum of $2,000 on the Bank of America, in the State of New York, and at the same time informed him that said check was for the $2,000 required under said agreement to be paid by your orator in cash, and as his first payment on account of his purchase of the aforesaid land and premises, and also, and at the same time, informed him that, if agreeable to him, your orator would have the deed and deed in trust required to be given under the aforesaid agreement, prepared between the said 15th day of April, and the 1st day of May, 1864; that thereupon, and on the same day, the defendant returned the said check for $2,000 to your orator, and informed him that he, the defendant, had not then time
10 to look into the business to which the check pertained, and that before closing said business he would see your orator and ask of him explanations, but did not indicate the character of the explanations, or the points on which he desired them; that in view of this response to his offer to pay as aforesaid, your orator inferred that, possibly, the defendant was unwilling to accept your orator's check on the bank aforesaid as a means of paying the said sum of money, for and on account of which it was drawn as aforesaid, although he had, as your orator well knew, no good reason to suppose that said check would not be promptly paid, if presented at the bank on which it was drawn; that to perfect his said purchase and to remove any objection, the defendant might have to accepting your orator's check, your orator on the next day, that is to say, on the 16th day of April, 1864, sent by his agent, constituted for that purpose, the sum of $2,000 in lawful money, that is to say, in United States legal-tender treasury notes, to the said defendant, and, by his said agent, requested the said defendant to receive and accept the said sum of lawful money so sent to him, as and for the cash payment required of your orator under the aforesaid agreement; that, as your orator is informed and believes, the said sum of lawful money for the purpose aforesaid, was duly tendered to the said defendant for
11 his acceptance by your orator's said agent, but he, the defendant, refused to receive and accept the same; that still believing the defendant would, as in justice and equity he should, carry out his part of the aforesaid agreement according to its true intent, spirit, and meaning, your orator, to perfect his said purchase, a few days after the said last-mentioned day, and on or about the 22d day of April, 1864, sent to the said defendant two deeds, prepared in blank, one of which your orator hoped would be executed by the defendant and his wife for the purpose of conveying to your orator and his heirs the aforesaid land and premises, and the other of which was intended by your orator to be executed by himself and his wife, in trust, and to such trustee as the defendant might select for this purpose, of securing the due payment of the deferred payments, and all interest to accrue thereon, agreeably to the terms and requirements

of the aforesaid agreement; but, contrary to your orator's hope, the said deeds in blank were returned to your orator by the said defendant, on or about the 23d day of April, 1864, in the same state and condition that they were in when they were sent by your orator and were received by the defendant, and at the time of returning
12 them, and as a reason for their return to your orator, he was informed by the defendant, that he, the defendant, was then so unwell as to be indisposed to give attention to any business; that after the return of the said last-mentioned papers to your orator, he, for the first time, became apprehensive that the said defendant might, and uneasy lest he should, refuse to carry out in good faith his part of the aforesaid agreement, and therefore, and that he might the better understand his equitable and legal rights in the premises, your orator consulted counsel, and was advised that whilst the deed, which had been prepared in blank as aforesaid, under a hope that it would be executed by the defendant and his wife, might be, and in fact was, in accordance with the spirit and equitable intent of the defendant's aforesaid agreement with your orator, and whilst, too, the defendant had made no objection to the form of the said deed, yet, inasmuch as it was not strictly accordant with the letter of the said agreement, it would be better, because it would be a more literal following of the terms of said agreement, for your orator to prepare another deed for the aforesaid land and premises, and tender the same to the said defendant for his sole execution and delivery; and that, thus advised, your orator, to perfect this aforesaid pur-
13 chase, on or about the 25th day of April, 1864, prepared, or caused to be prepared, a new deed, to be executed only by the said defendant, for the purpose of conveying the aforesaid land and premises to your orator and his heirs, and, on the said last-mentioned day, placed the same, together with the deed in trust previously prepared, and already hereinbefore particularly referred to, and together also with the sum of $2,000 in lawful money, that is to say, in United States legal-tender treasury notes, in the hands of his agent constituted for the purpose, and instructed his said agent to go to the said defendant, and tender to him on behalf of your orator the said last-mentioned lawful money, as and for your orator's cash payment under the aforesaid agreement, and also to tender to the said defendant, for his sole execution, the deed last prepared as aforesaid by your orator, and further instructed said agent to inform the said defendant that your orator was, on his part, willing and anxious to execute and deliver the said trust deed, wherever it should be proper for him to do so; and your orator files herewith the said last-mentioned two deeds, marked, respectively, Exhibit J. C. W., No. 2, and Exhibit J. C. W., No. 3, and prays leave to refer to and read the same as part of this his bill of complaint.

14 *Exhibit J. C. W., No. "2."*

This indenture, made this day of April, in the year of our Lord eighteen hundred and sixty-four, between Benjamin O. Tayloe, of the city of Washington in the District of Columbia, of the first part, and

Joseph C. Willard of the same place of the second part. Whereas, by a certain other indenture, bearing date on the 12th day of April, 1854, heretofore made by and between the parties hereto, the said Benjamin O. Tayloe did demise, lease, and to farm let unto the said Joseph C. Willard "all that lot or parcel of land situate and being in said city of Washington, and fronting between 14th and 15th streets on Pennsylvania avenue, about one hundred feet by about the same number of feet in depth to an alley," being the property then occupied by one David Rowland, and then "generally called and known as the Mansion House," for the term of ten years, commencing with the first day of May then next ensuing, at and for an annual rent of twelve hundred dollars, to be paid in equal quarterly payments; and in and by the said indenture did also promise and agree to and with the said Joseph C. Willard that he, the said Joseph C. Willard, "should have the right or option to purchase the above-described lot or piece of ground, together with all the buildings and improve-
15 ments thereon, at any time before the expiration of the lease aforesaid, on paying or securing to be paid for the same the sum of twenty-two thousand and five hundred dollars, payable as follows: two thousand in cash, and two thousand, together with the interest on all the deferred instalments, in each and every year thereafter till the whole is paid, the deferred payments to be secured by a deed of trust on the property; a good warrenty deed to be given to the said Joseph C. Willard, his heirs or assigns, except only as to the yearly ground-rent of three hundred and ninety dollars existing against the property, and subject to which the said deed from the said Benjamin O. Tayloe to the said Joseph C. Willard was to be made," all which will more fully and at large appear on reference to the said hereinbefore referred to and in part recited indenture, which is duly recorded in liber J. A. S., No. 80, folios 163, 164, and 165, one of the land records for Washington county, in the District of Columbia; and whereas, also, the said Joseph C. Willard, in the exercise of the right or option given and granted to him by the said Benjamin O. Tayloe as aforesaid, has, before the expiration of the aforesaid lease, elected, offered, and tendered himself ready to purchase, in the terms aforesaid, the property and premises hereinbefore described, being the same land and premises that were heretofore sold and conveyed to the said Benjamin O. Tayloe by one Richard Smith as trustee, by his
16 certain deed bearing date on or about the 26th day of January, 1842, and duly recorded in liber W B, No. 93, folio 45, &c., another of the land records for Washington county, in the District aforesaid, as will in reference thereto more fully and at large appear, and also being the same land or parcels of land known and distinguished on the plat or ground plan of the aforesaid city of Washington, as lots numbered, respectively, four (No. 4,) and five (No. 5,) in square numbered two hundred and twenty-five, (sqr. No. 225:) Now this indenture witnesseth, that for and in consideration of the premises, and of the sum of twenty-two thousand and five hundred dollars, lawful money of the United States, by the said Joseph C. Willard to the said Benjamin O. Tayloe in hand paid, or secured to be paid at and before

the sealing and delivery of these presents, the said Benjamin O. Tayloe hath bargained and sold, aliened, and enfeoffed, and by these presents doth give, grant, bargain, and sell, alien, enfeoff, release, convey, and confirm unto the said Joseph C. Willard, his heirs and assigns, the said hereintofore described land and premises, together with all and singular the buildings, improvements, ways, rights, privileges, advantages, appurtenances, and other hereditaments therein belonging or in anywise appertaining, and all the estate, right, title, and interest, claim, and demand whatsoever, at law and in equity, of him, the said Benjamin O. Tayloe, of, in, and to the same.

17 To have and to hold the said hereinbefore described land and premises, with the appurtenances thereto belonging unto the said Joseph C. Willard, his heirs and assigns, to his and their proper use and behoof forever, subject nevertheless, and at all times hereafter, to the due and regular payment by the said Joseph C. Willard, his heirs and assigns, of an annual ground-rent of three hundred and ninety dollars, heretofore charged and still chargeable upon, and heretofore and still issuing out of, the said hereinbefore described land and premises, and subject to which the said land and premises are, by these presents, bargained, sold, and conveyed.

And the said Benjamin O. Tayloe, for himself, his heirs, executors, and administrators, and for every of them, doth by these presents covenant, promise, and agree to and with the said Joseph C. Willard, his heirs and assigns, that he, the said Benjamin O. Tayloe, his heirs and assigns, the land and premises above described and herein mentioned to be granted, bargained, and sold, with the appurtenances, unto the said Joseph C. Willard, his heirs and assigns, shall and will warrant and forever defend, by these presents, against the claims of all persons whomsoever, excepting only and always the person or persons claiming or to claim the yearly ground-rent of three

18 hundred and ninety dollars charged and chargeable upon the said land and premises, as hereinbefore said.

In testimony whereof, the said Benjamin O. Tayloe has hereunto set his hand and affixed his seal in the day and year first hereinbefore written.

——— ———. [SEAL.]

Signed, sealed, and delivered in the presence of—

——— ———.

DISTRICT OF COLUMBIA, *Washington county, to wit:*

We, and , justices of the peace in and for the county of Washington aforesaid, in the District of Columbia, do hereby certify that Benjamin O. Tayloe, a party to a certain deed bearing date on the day of April, anno Domini 1864, and hereto annexed, personally appeared before us, in our county aforesaid—the said Benjamin O. Tayloe, being personally well known to us as the person who executed the said deed—and acknowledged the same to be his act and deed.

Given under our hands and seal this day of , A. D. 1864.

——— ———, *J. P.* [SEAL.]

——— ———, *J. P.* [SEAL.]

19 *Exhibit J. C. W., No.* "3."

This indenture, made this day of April, in the year of our Lord eighteen hundred and sixty-four, between Joseph C. Willard and Antonia F. Willard, his wife, of the city of Washington, in the District of Columbia, of the first part, and of the same place, of the second part.

Whereas the said Joseph C. Willard is indebted unto Benjamin O. Tayloe in the sum of twenty thousand and five hundred dollars, for and on account of the purchase of the land hereinafter described, which said indebtment, if not sooner paid, is, together with the yearly interest to accrue thereon, to be paid in and by consecutive annual instalments, in manner following, that is to say: the first instalment of said debt and interest, amounting to thirty-two hundred and thirty dollars, is to be paid on or before the first day of May, 1865; the second, amounting to thirty-one hundred and ten dollars, is to be paid on or before the first day of May, 1866; the third, amounting to twenty-nine hundred and ninety dollars, is to be paid on or before the first day of May, 1867; the fourth, amounting to twenty-eight hundred and seventy dollars, is to be paid on or before the first day of May, 1868; the fifth, amounting to twenty-seven hundred and fifty dollars, is to be paid on or before the first day of May, 1869;
20 the sixth, amounting to twenty-six hundred and thirty dollars, is to be paid in or before the first day of May, 1870; the seventh, amounting to twenty-five hundred and ten dollars, is to be paid on or before the first day of May, 1871; the eighth, amounting to twenty-three hundred and ninety dollars, is to be paid on or before the first day of May, 1872; the ninth, amounting to twenty-two hundred and seventy dollars, is to be paid on or before the first day of May, 1873; the tenth, amounting to twenty-one hundred and fifty dollars, is to be paid on or before the first day of May, 1874; and the eleventh and last, amounting to five hundred and thirty dollars, is to be paid on or before the first day of May, 1875; but it is understood and agreed that the said Joseph C. Willard has and will have the right, which he may exercise or not at his option, to anticipate the payment of any or all of the aforesaid instalments, and to pay the same, or any of them, with a proper rate of interest thereon, at any time or times in advance of the time or times hereinbefore mentioned in the payment thereof. And whereas, also, the said Joseph C. Williard and Antonia F. Willard, his wife, are anxious to secure the faithful payment of the aforesaid indebtment, together with the yearly interest to accrue thereon, in and by annual instalments as hereinbefore said, and have therefore agreed to make and execute these presents; now this indenture witnesseth, that for and
21 in consideration of the premises, and of the sum of five dollars by the party hereto of the second part to the parties hereto of the first part in hand paid, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, the said parties of the first part have bargained and sold, aliened and enfeoffed, and by those presents do give, grant, bargain, and sell, alien,

enfeoff, release, convey, and confirm unto the said party of the second part, his heirs and assigns, these certain pieces or lots of land, and each of them, situate and lying in the aforesaid city of Washington, and which are respectively known and distinguished on the plat or ground plan of said city as lot numbered four, (4,) and lot numbered five, (5,) in square numbered two hundred and twenty-five, (sq. No. 225,) together with all and singular the buildings, improvements, ways, rights, privileges, advantages, appurtenances, and other hereditaments thereto belonging or in anywise appertaining, and all the estate, right, title, and interest whatsoever, at law and in equity, of them, the said parties of the first part, of, in, and to the same, to have and to hold the said hereinbefore described land and premises, with the appurtenances thereunto belonging, unto the said party of the second part, his heirs and assigns, to the only proper use
22 of the said party of the second part, his heirs and assigns; subject, however, at all times hereafter, to the due and regular payment by the said party of the second part, his heirs and assigns, of an annual ground rent of three hundred and ninety dollars heretofore charged and still chargeable upon, and heretofore and now issuing out of, the said land and premises; and in trust, nevertheless, and in, for, and upon each of the following trusts, that is to say, in trust to suffer and permit the said parties of the first part, their heirs and assigns, without charge, let, or hindrance of any sort, to have, use, and enjoy the aforesaid land and premises, with the appurtenances thereunto belonging, as well as the rents, issues, and profits thereof, until such time as the said party of the second part, his heirs or assigns, may, as hereinafter provided, be required to sell the said land and premises for the purpose of executing any other or further trust hereinafter created or declared. Secondly, in trust to execute and deliver to the said Joseph C. Willard, his heirs or assigns, a good and sufficient deed of release of and for the aforesaid land and premises, with the appurtenances thereto belonging, and of and for every other matter or thing herein contained; provided he, the said Joseph C. Williard, or his executors, administrators, heirs, or assigns,
23 shall duly and faithfully pay the aforesaid indebtment, together with the yearly interest to accrue thereon, to the said Benjamin O. Tayloe, his executors, administrators, or assigns, in the manner and at or before the time and times hereinbefore mentioned and prescribed for the payment thereof. But if he, the said Joseph C. Willard, or his executors, administrators, heirs, or assigns shall fail to pay, either before or at the time the same shall become due and payable, each and every instalment hereinbefore mentioned and required to be paid on account and in discharge of the aforesaid indebtment, and the yearly interest to accrue thereon; then, thirdly, in further trust, that at, upon, or any time after the failure of the said Joseph C. Willard, his executors, administrators, heirs, or assigns, to pay, duly and faithfully, according to the true intent and meaning of these presents, any one of the aforesaid eleven instalments of debt and interest, the said party of the second part, his heirs and assigns, shall and will, on being first thereto requested in

writing by the aforesaid Benjamin O. Tayloe, his executors, administrators, or assigns, enter upon the aforesaid land and premises, and, after giving at least twenty days' public notice by advertisement in some newspaper published in the aforesaid city of Washing-
24 ton, of the time, place, and terms of sale, proceed to sell the same at public auction and to the highest bidder, upon such terms as he or they may deem most for the advantage of all concerned, in the due execution of this trust, and afterwards convey the said land and premises to the purchaser or purchasers thereof, on his or their complying with the the terms of said sale, and out of the proceeds of the said sale, the said party of the second part, his heirs or assigns, shall first pay the expenses thereof, and all other expenses properly incident to this trust, including in said expenses a commission of two and a half per centum on the gross amount of said sale, to compensate his or their trouble in executing said trust, and shall next pay such part or portion of the aforesaid indebtment of twenty thousand and five hundred dollars, as may be then unpaid, together with any and all interest that may have then accrued and that may then remain unpaid on said indebtment, or on any part thereof, and the residue of said proceeds shall pay over to the said Joseph C. Willard, his heirs and assigns. And the said Joseph C. Willard, for himself, his heirs and assigns, by these presents covenants, promises, and agrees to and with the said party hereto of the second part, his heirs and assigns, that the parties hereto of the first part, and their heirs and assigns, the hereinbefore described land and
25 premises, with the appurtenances, shall and will quietly surrender and peaceably deliver to the said party of the second part, his heirs or assigns, whenever, for the purpose of executing either of the trusts hereinbefore created or declared, it shall or may be necessary for him or them to enter upon and sell the said land and premises, with the appurtenances thereto belonging.

In testimony whereof, the said Joseph C. Willard and Antonia F. Willard, his wife, have respectively hereunto set their hands and seals, on the day and year first hereinbefore written.

The word "before," being first interlined between 1st and 2d lines of 3d page.

_____ _____. [SEAL.]
_____ _____. [SEAL.]

Signed, sealed, and delivered in the presence of—
_____ _____.

DISTRICT OF COLUMBIA, *Washington county, to wit:*

We, and , justices of the peace in and for the county of Washington aforesaid, in the District of Columbia, do hereby certify that Joseph C. Willard, a party to a certain deed bearing date on the day of April, 1864, and hereto annexed, personally appeared before us, in our county aforesaid—the said Joseph C. Willard,

being personally well known to us as the person who executed the said deed—and acknowledged the same to be his act and
26 deed.

Given under our hands and seals this day of , anno Domini 1864.

——— ———, *J. P.* [SEAL.]
——— ———, *J. P.* [SEAL.]

DISTRICT OF COLUMBIA, *Washington county, to wit:*

We, and , justices of the peace in and for the county of Washington aforesaid, in the District of Columbia, do hereby certify that Antonia F. Willard, the wife of Joseph C. Willard, a party to a certain deed bearing date on the day of April, 1864, and hereunto annexed, personally appeared before us in our county aforesaid—the said Antonia F. Willard being personally well known to us as the person who executed the said deed—and being by us examined, privily and apart from her said husband, and having the deed aforesaid fully explained to her, she, the said Antonia F. Willard, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under our hands and seals this day of , anno Domini 1864.

——— ———. [SEAL.]
——— ———. [SEAL.]

Filed April 29, 1864.

27 And further, your orator says he is informed, and verily believes, that his said last-mentioned agent, pursuant to the instructions given him by your orator as aforesaid, did, on the said last-mentioned day, and on each intervening day between that day and the day of filing this bill of complaint, go to the dwelling-house of the said defendant, and take with him on each occasion the aforesaid and last-mentioned sum of lawful money, and the aforesaid and last-mentioned two deeds, to the end that he, the said agent, might, on behalf of your orator and for the reasons and purposes aforesaid, tender the said last-mentioned sum of lawful money tothe said defendant for his acceptance, and the said blank deed filed herewith, and marked Exhibit J. C. W., No. 2, as aforesaid, for his execution and delivery, and submit for his inspection and approval the said blank deed in trust, filed herewith and marked Exhibit J. C. W., No. 3; but your orator is informed and believes, and on information and belief says, that on each and every call made by his last-mentioned agent at the dwelling-house of the said defendant as
28 aforesaid, and for the purpose aforesaid, he, the said agent, was told by some member of the defendant's family, either that the said defendant was not at home, or that he had left the city and would not return before Monday, the second day of May, 1864, by reason whereof your orator's said last-mentioned agent, after diligent,

persevering, and oft-repeated effort on his part, has been unable to obtain an interview with the said defendant, and therefore wholly unable to make in behalf of your orator the tender which, for the purposes aforesaid, your orator had specially authorized and instructed him to make to the said defendant, of the said last-mentioned sum of lawful money, and the said last-mentioned deeds.

Further, your orator says, and shows unto your honors, that the lease heretofore made by the said defendant and accepted by your orator of the aforesaid land and premises for the term of ten years will fully, and on the 30th day of the current month, that is to say, on the 30th day of April, 1864, and as by the terms of the aforesaid agreement your orator is obliged to complete, or tender himself ready to complete, his purchase of the aforesaid land and premises before the expiration of the said lease, he, to preserve his right to complete said purchase, is reluctantly compelled to file this his bill of complaint, and to invoke the protection of your honorable court, sitting in equity, where alone such matters are properly cognizable, lest perchance the said defendent, if he is really absent from this city with the intention of remaining absent, as it has been said, until the second day of May next, should, on his return to said city, altogether refuse to permit your orator to complete his purchase of the aforesaid property, and attempt to justify his said refusal, and urge as a reason therefor that the time within which, under the agreement aforesaid, your orator was to complete his said purchase, and was to acquire the legal title to the said property, has gone by and passed away.

29

In consideration of the premises, your orator prays that the said defendant may be decreed specifically to perform his part of the agreement entered into by and between him and your orator as aforesaid, and to make a good warranty deed to your orator, and his heirs and assigns, in accordance with the terms and true intent and meaning of his said agreement, your orator being now, as heretofore, ready and willing and hereby offering specifically to perform said agreement on his part according to the true intent and meaning thereof; and that your honors will grant unto your orator such other and further relief in the premises as unto your honors, the premises considered, shall appear just and proper; and also that your honors will grant unto him the United States writ of subpœna, commanding the said defendant that on some certain day to be therein named, he be and appear before your honorable court, and on his corporal oath, make full, true, and perfect answers to all and singular the allegations herein contained, as if the said allegations were herein again severally repeated, and he particularly interrogated thereto; and your orator, as in duty bound, will ever pray, &c.

30

(Signed) JOHN C. KENNEDY,
Sol'r for Compl't.

Filed April 29, 1864.

R. J. M., *Cl'k.*

31 Supreme court of the District of Columbia.

BENJAMIN OGLE TAYLOE, defendant, *ads.* JOSEPH C. WILLARD. } In equity.—No. 207.

The answer of Benjamin Ogle Tayloe to the bill of complaint of Joseph C. Willard, in chancery exhibited: This defendant, saving and reserving to himself any and all manner of exceptions to the manifold errors, uncertainties, and other imperfections in said bill contained, for answer thereto, or to so much thereof as he is advised that it is necessary and material for him to answer, doth, now answering, say: That he admits the execution and delivery of the lease, dated April 12th, 1854, referred to in the bill, and recorded in liber J. A. S., No. 80, fol. 163 and seq., and for the true construction and proper legal effect thereof in the matter alleged by the complainant's bill, he humbly submits to the judgment of the court, upon the issues and facts as they shall appear upon the pleadings and evidence. And this defendant further submits to the judgment of the court that, even

32 if the complainant had the right to make the purchase which he claims, which is denied, yet on his own showing upon the face of his bill, he hath not availed himself of such supposed right, but hath failed to make such supposed right effectual.

And the defendant further says that, by the terms of the said lease and agreement of April 12th, 1854, no purchase of the land and premises in question was made or agreed; but there was reserved to the complainant a mere right to make a purchase thereof, upon certain specified terms and conditions, if within the time specified the complainant at his option and election should make such purchase, he complying with the terms and conditions of the said lease and agreement in that behalf. But the said complainant, on his own showing by his bill, did not so comply, and moreover, by the law of the land which supervened upon the said lease and agreement, before the date of the alleged acts of the complainant, which he sets up as constituting such contract of purchase, to wit, the alleged acts and transactions in the month of April, 1864, no such contract of purchase was or could have been effectual or valid in law, even if the facts in the behalf set up in the bill were true; and this according to the true intent and meaning of the acts of Congress touching such contracts, of which this honorable court takes judicial notice, and the benefit of which the defendant humbly prays as if formally and specially

33 pleaded.

And the defendent further says, in point of fact, that he desires and calls upon the complainant to prove, if he can, that he, the complainant, tendered, within the term of said lease, the purchase-money and security therefor set forth and prescribed in the said lease as the conditions of the said purchase.

And the defendant further says that he is advised, and therefore submits, that the complainant in and by his said bill shows and plainly admits that he knows that he had not, prior to the filing of the said bill, made the purchase pretended by him, or, as he expresses

it, "perfected his purchase." And relying upon the failure of the complainant to make such purchase, by reason of any matter *ni pais* alleged in the bill, (which he is hereby required to maintain and prove, the same not being admitted,) this defendant submits to the court that the complainant, by his bill and exhibits, plainly shows that he attempted to exercise his supposed right of purchase by claiming to give for the cash payment referred to in said lease a check on a bank in New York, of whose relations with the complainant this defendant had no knowledge, and without tendering any notes or bonds, and without complying with the acts of Con-
34 gress touching the internal revenue in respect of which alleged purchase and the securities to be given or tendered in order to make such purchase effectual or binding in any way upon this defendant.

And further the defendant showeth that after the making and delivery of the said lease the terms thereof were, at the special instance and request of the said complainant, departed from, and the said lease was virtually, and, in fact and law, effectually and truly surrendered and abandoned by the said complainant, and a new lease and renting by parol at a different and diminished rent, verified and carried into effect by payments and receipts, and subtituted for the original lease, and thereby by the collateral provision for future purchase, as incidental to the said original lease, and to be made at the option of the complainant on certain special terms and conditions, lapsed and was extinguished, and the consideration for such provision failed.

And further he says, that after the making of said lease and agreement of April 12th, 1854, to wit, on the twenty-seventh (27) day of August, 1861, whatever right the said complainant might
35 have had to claim such purchase or to maintain this his bill of complaint, in his sole and individual right, ceased to exist by reason of a certain conveyance and assignment of that date, executed and delivered by said complainant to one Henry A. Willard, of the said leasehold estate, with all its incidents, privileges, and appurtenances, which said conveyance and assignment was duly recorded in liber J. A. S., No. 212, fol. 431, &c., one of the land records of the District of Columbia, and a copy from which record is herewith exhibited, marked Def. 4, No. 1.

Copy.—Exhibit No. 1.

Joseph C. Willard to Henry A. Willard.—Deed recorded 30 Aug., 1861.

This indenture, made this twenty-seven day of August, in the year eighteen hundred and sixty-one, between Joseph C. Willard of the first part, and Henry A. Willard of the second part, both of Washington city and District of Columbia. Whereas heretofore, to wit, on the twelfth day of April, in the year eighteen hundred and fifty-four, Benjamin O. Tayloe, by his certain indenture of lease, granted, leased, and to farm let to the said Joseph C. Willard, his executors

or assigns, all that lot or parcel of land situate and lying in
36 the city of Washington aforesaid, and fronting between 14th and 15th streets on Pennsylvania avenue, about one hundred feet by about the same number of feet in depth to an alley, being the same property then occupied by Daniel Rowland, and known as the Mansion House, to have and to hold the same unto the said Joseph C. Willard, his executors or assigns, for and during the full term of ten years, commencing with the first of May thence next ensuing, yielding and paying therefor unto the said Benjamin O. Tayloe, his heirs or assigns, the just and full annual rent of twelve hundred dollars in equal quarterly payments as in and by the said in part recited indenture of lease recorded in liber J. A. S., No. 80, folios 163, 164, and 165, one of the land records for Washington county in the District of Columbia, reference to which thereunto had will more fully appear, and also containing certain covenants and privileges relating to the erection and building of any houses, tenements, or other structures, as said lessee might think proper, upon said premises during said lease, and also the right or option to purchase the said premises at any time before the expiration of said lease,
37 upon the terms therein stipulated and set forth, reference to which lease, for greater certainty and as part of these presents, is hereby made:

Now this indenture witnesseth, that the said Joseph C. Willard, for and in consideration of the sum of ten dollars current money of the United States to him in hand paid by the said Henry A. Willard, at and before the sealing and delivery of these presents, the receipt whereof he doth hereby acknowledge, hath granted, bargained, and sold, assigned, transferred, and set over, and by these presents doth grant, bargain, and sell, assign, transfer, and set over to the said Henry A. Willard, his executors, administrators, and assigns, one equal undivided moiety or half part of and in the said piece or parcel of ground in the said hereinbefore in part recited indenture of demise particularly described, together with the equal undivided moiety or half part of the said lease of the said premises for the residue of the said term of ten years therein mentioned, and also all the advantages, rights, and interests in the agreement of purchase and covenants on the part of the lessor therein contained, so that the said Henry A. Willard, his executors, administrators, and assigns,
38 shall and may be henceforth equal copartners therein with the said Joseph C. Willard, his executors, administrators, and assigns, he and they paying one-half the rent reserved in and by said indenture, and equally keeping and performing the covenants on the part of the said lessee therein and thereby contained and set forth and to be performed by said lessee. To have and to hold the said undivided moiety or half part of all and singular the premises to, unto, and to the use of the said Henry A. Willard, his executors, administrators, and assigns.

In testimony whereof, the said parties of the first and second

parts have hereunto set their respective hands and seals the day and year first above written.

J. C. WILLARD. [SEAL.]
H. A. WILLARD. [SEAL.]

Signed, sealed, and delivered in the presence of—
N. CALLAN.
O. E. P. HAZARD.

DISTRICT OF COLUMBIA, *Washington county, sct:*

We, N. Callan and O. E. P. Hazard, justices of the peace in and for the county aforesaid, in the District aforesaid, do hereby certify that before us, in our said county, personally appeared Joseph C. Willard and Henry A. Willard, parties to a certain indenture
39 of lease hereto annexed, bearing date the day of 27th , A. D. 1861, they being personally well known to us to be the persons who executed the said indenture, and each for himself acknowledged the same to be his act and deed.

Given under our hands and seals this 27th, day of August, in the year eighteen hundred and sixty-one.

(Signed) N. CALLAN, *J. P.* [SEAL.]
(Signed) O. E. P. HAZARD, *J. P.* [SEAL.]

And the defendant prays that he may have the benefit of this specia defence and exception as if the same had been specially pleaded. And in matter of fact, he says that the said Henry A. Willard has notified him that he, the said Henry, did not authorize, and was wholly ignorant of the proceedings of the said complainant, in respect of the said alleged election of the right of purchase claimed by the complainant upon the terms of the before-mentioned provision in the said lease. And this defendant further says, that by the filing of the bill in this case, within the term of said lease, the claims and pretensions of the complainant assumed their distinct and final shape, and the complainant thereby definitely exercised his option of purchase, if
40 any he had, and thereby attempted to claim of this defendant the execution and performance of the said provision for purchase; but in so doing the complainant did not demand the execution and performance of the lease and contract whereon his supposed right and remedy rest, but did demand the execution and performance of a supposed contract, which, by the complainant's own showing, and especially by the clear and explicit terms of the lease exhibited by him, was never entered into or contemplated by the parties thereto, but is utterly repugnant thereto; in this that whereas the said provision for election to purchase does plainly declare what sum should be paid in cash, to wit, $2,000, and that the residue of the purchase money should be paid as follows, "ten thousand dollars, ($10,000,) together with the interest on all the deferred instalments in each and every year thereafter, till the whole is paid. The deferred payments to be secured by a deed of trust on the property." Nevertheless the said complainant in and his said bill filed

the term of said lease, and designed and expressed to be in final execution of his supposed right of purchase, claims and demands of the defendant the execution of, and offers himself ready to
41 execute an agreement of purchase and sale whereby, at the option of the complainant, and without regard to the manifest interest of the defendant, and in point of fact, in the then condition of the currency, to the great injury and loss of this defendant, the whole purchase might at any time be paid by the complainant, thereby not only subjecting this defendant to a very heavy loss in money, but ignoring and rejecting the investment contemplated and provided for the benefit of this defendant, and compelling him, if he had submitted or should submit to such unauthorized alteration, to bear the trouble, expense, and risk of some new investment.

And further, he says, that by the public acts of the legislative, executive, and judicial branches of the government, and by the great national acts and events which had occurred when the complainant filed his bill, and which were and are still influencing all values and interests in the country, such a state of things had arisen and now exists, as according to the precedents and rules of equity and good conscience ought to present a decree for specific performance in this case, upon a demand made on the last day of a term of ten years, even if in street law, which is denied, the complainant were entitled to make such demand.

42 As to all such parts of complainant's bill as are not herein specifically answered, this defendant is advised that the same are impertinent, and not necessary to be specially replied to, and he prays to be hence dismissed with costs, &c.

BENJ. OGLE TAYLOE.

W. Y. FENDALL, *Solic'r for* .

Sworn and subscribed before me Dec. 6, 1864.

R. J. MEIGS, *Cl'k.*

As to so much of the aforegoing answer as sets up matter of defence in law, I certify that in my opinion the same is well founded, and that it is not interposed for delay.

W. Y. FENDALL,
Sol'r for .

Filed December 7, 1864.

43 Supreme court of the District of Columbia.

JOSEPH C. WILLARD
vs.
BENJAMIN O. TAYLOE. } No. 207.—Equity.

This repliant, saving all exceptions to the errors, uncertainties, and insufficiencies of the answer of said defendant, for replication thereunto saith, that he doth and will ever maintain and prove his said bill to be true, certain, and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is uncertain, evasive, and insufficient to be replied unto by this repliant, without

that, that every other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, is true; all which matter this repliant is ready to maintain, aver, and prove, &c.

KENNEDY & DAVIDGE,
Sol'rs for Compl't.

Filed Dec'r 22, 1864.

44 In the supreme court of the District of Columbia.—Equity docket, No. 7.—In chancery, No. 207.

JOSEPH C. WILLARD
vs.
BENJAMIN OGLE TAYLOE.

Testimony in behalf of petitioner.

Deposition of William H. Hazard, pages 2 to 6.
Deposition of John C. Kennedy, pages 7 to 8.
Deposition of Joseph C. Willard, pages 9 to 47.
Deposition of William H. Ward, pages 48 to 49.

Taken at Washington city, between the 20th of January and the 11th of February, 1865, before me.

EDM. F. BROWN,
Examiner in Chancery.

Filed February 27, 1865.

45 In the supreme court of the District of Columbia.

JOSEPH C. WILLARD
vs.
BENJAMIN OGLE TAYLOE. } In chancery, No. 207.—Equity docket, 7.

I, Edward F. Brown, an examiner appointed by said court, do hereby certify that on the 16th day of January, A. D. 1865, it was made known to me by John C. Kennedy, esq., of counsel for the abovenamed petitioner in said cause, that it was desired by said petitioner that the evidence to be adduced in said cause shall be taken orally, and, therefore, I ordered that the witnesses named by him shall be examined before me on Friday, the 20th day of January, 1865, at 10 o'clock in the forenoon, and that notice of the time and place of such examination should be given to W. Y. Fendall, esq., the solicitor for the said defendant.

And I do further certify, that on Friday, the 20th of January, 1865, pursuant to the appointment above mentioned, and to the notice hereunto annexed, Messrs. Kennedy & Davidge appeared on behalf of the petitioner, and W. Y. Fendall, esq., as counsel for the defendant. Mr. Willard, the petitioner, and Mr. Tayloe, the defendant, were also present; and the evidence was taken orally, as follows:

46 William H. Hazard, being duly sworn, doth depose and say, in answer to interrogatories propounded to him by the counsel for the petitioner, as follows:

I am twenty-three years of age, and resident at No. 259 Ninth street west, in the city of Washington. My occupation is that of clerk in the store of D. J. Bishop, a stationery and periodical dealer.

I know the parties to this cause; I have known Mr. Willard between 4 and 5 years, and Mr. Tayloe between 3 and 4 years.

Since I have known Mr. Tayloe, he has resided in Madison Place, and still resides there.

1st. int. Were you requested by Mr. Willard, at any time last spring, to convey to Mr. Tayloe any money and papers? If so, what directions did you receive from Mr. Willard, and what was your action in pursuance of such directions?

(Objected to by Mr. Fendall, counsel for the defendant.)

Answer. In the month of April last, I was requested by by Mr. Willard to take to Mr. Tayloe, at his residence, certain documents or papers, with two thousand dollars in legal-tender treasury notes. Mr. Willard called at my store and made that request, and I went to the Mansion House with him, and he there gave me the papers and money. The money consisted of two one thousand dollar treasury notes. He requested me to see Mr. Tayloe if I could, and say to him that I was authorized by Mr. Willard, and another, a lawyer,
47 whose name I do not recollect, to give him those papers, for him to examine them, and if he saw fit to take the documents and money, to leave them with him, taking a receipt for the money. That is the substance of what was said, as well as I can recollect. It was between the 25th and 29th of April last. I am satisfied it was 3 or 4 days before the 29th; I don't recollect that Mr. Willard told me for what purpose the papers and money were to be tendered; it was something in regard to the Mansion House.

I carried the papers and money to Mr. Tayloe's residence, and asked if he was in; I was told by the servant that he was not; that he had gone out riding. I called on the same day that I received the money and papers from Mr. Willard; I asked the servant when he expected him in; he said he did not know. In a day or two I called again and took the same papers and the same money; I inquired of the servant if he was in; he said he was not, but had left the city; he said he would be back the next week. My second visit, I am satisfied was before the 29th of April. I immediately reported to Mr. Willard my failure to find Mr. Tayloe, and returned him the papers and money.

2d int. Examine the two papers now shown you, and state when, and on what occasion, you first saw them; and by whom they were shown you.

Answer. It was in the month of April last, at the Mansion House, that I first saw them; Mr. Willard showed them to me on the occasion to which I have testified above. I suppose these to be

48 same papers which I was to hand to Mr. Tayloe for examination. They resembled these very much.

(These papers are marked Chancery Exhibits Nos. 2 and 3, in this cause.)

I recognize the handwriting and general appearance of the papers as the same as the papers handed to me by Mr. Willard.

3d int. In the directions given to you by Mr. Willard, was there anything in relation to the alteration of the papers if not satisfactory to Mr. Tayloe? If so, what?

Answer. I don't know that there was anything said about an alteration; I was directed to leave them with him for examination, and to ask him to notify Mr. Willard of the result of the examination.

Cross-examination, by W. Y. Fendall, esq., counsel for the defendant:

I cannot remember the precise date that Mr. Willard came to me with the papers and money; it was between the 25th and 29th of April; it was the early part of the week; it was three or four days between my first and second visits to Mr. Tayloe's house—no, it was 2 or 3 days; I did not retain the papers and money between the time of my two visits; I gave them to Mr. Willard as soon as I returned from Mr. Tayloe's; I did not at any time read the papers which Mr. Willard gave me. Judging from the appearance and handwriting of the papers which have been shown me, they are the papers

49 which were handed me by Mr. Willard; I cannot say that the papers handed me by Mr. Willard were all in the same handwriting; there is nothing that I can see in these papers different from those handed me by Mr. Willard; they were not opened by me; I don't recollect the day of the week that I made my second visit to Mr. Tayloe's house; it was 2 or 3 days after I went first; it was about the middle of the week, as well as I can recollect; I never had any conversation with Mr. Tayloe in regard to the business to which I have testified; and I never saw him upon the subject.

1st x-int. What is it that causes you to remember that your second visit to Mr. Tayloe's residence was made before the 29th of April last?

Answer. Because my first visit was about the 25th, and my second visit was, I am confident, 2 or 3 days after that.

2d x-int. What is it that causes you to remember that your first visit was made about the 25th of April?

Answer. The fact that I commence making out the bills of the store about the 20th of the month, and I generally get through by the last of the month; and I was busy on them and nearly done when Mr. Willard called on me the first time. I know of no other fact which impresses it upon my memory.

50 Direct-examination resumed:

4th int. Have you any doubt that both your visits to Mr. Tayloe, testified to above, were made before the 29th of April last?

Answer. I have none.

Cross-examination resumed:

3d x-int. Can you state whether your second visit to Mr. Tayloe's residence was made *on* the 29th or *before* the 29th of April last?

Answer. It was before the 29th.

(Signed) W. H. HAZARD.

Sworn to and subscribed before me this 20th day of January, 1865.

(Signed) EDM. F. BROWN, *Examiner.*

[5-cent revenue stamp]

51 John C. Kennedy, esq., being duly sworn, doth depose and say, in answer to interrogatories proposed to him by W. D. Davidge, esq., of counsel for the petitioner, as follows:

I am 53 years of age, and by profession a lawyer. I know the parties to this suit. I have known Mr. Tayloe by sight a number of years; personally, four or five years. I have known Mr. Willard about a year. In the month of April, 1864, Mr. Willard called at my office and consulted me professionally in relation to his rights under an indenture of lease seemingly before then made by him and Mr. Tayloe of property in this city commonly known as the Mansion House, located upon Pennsylvania avenue. He especially wanted to know his right to purchase said property under a covenant contained in his lease The indenture of lease exhibited to me by him is the same filed in this cause, marked complainant's "Exhibit No. 1," and now shown me. After examining the lease and confining my examination to it and the covenants embraced in it, I said to him that I regarded his right to purchase as unquestionable. I then prepared the two papers filed in the cause now shown me, marked Exhibits 2 and 3. I have no independent recollection of the precise date when these papers were prepared, but I drew the bill in the cause, and I distinctly recollect that the averment in the bill of the preparation of the above papers on or about the 25th of April, 1864, was based upon my knowledge of their preparation on the 25th of April.

52 In averring a date in pleading, it is my practice to state it on or about. I have no doubt the papers passed from my hands into those of Mr. Willard on the 25th of April, 1864. Between the 25th and 29th they were returned to me by Mr. Willard. I know that they were returned to me on or before the 29th of April, for the reason that on that date I filed them as exhibits with the bill in this cause.

(Mr. Fendall, counsel for the defendant, objects to any conversation that may have taken place by Mr. Kennedy and Mr. Willard, and also to any opinion expressed by Mr. Kennedy.)

(Signed) JOHN C. KENNEDY.

Sworn to and subscribed before me this 20th day January, 1865.

(Signed) EDM. F. BROWN, *Examiner.*

[5-cent revenue stamp]

At 12 o'clock, noon, adjourned until Monday the 23d inst., at 10 o'clock a. m.

(Signed) EDM. F. BROWN, *Examiner.*

53 MONDAY, 23*d January*, 1865.

Met pursuant to adjournment.

Joseph C. Willard, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by counsel for petitioner, as follows :

My age is forty-four years years ; I have no particular occupation at present, except the management of my property ; my residence is in Washington city. I am complainant in this cause.

The paper now shown me, marked Exhibit J. C. W., No. 1, is a lease made between Benjamin O. Tayloe and myself, dated April 12th, 1854, of the Mansion House property, situated on Pennsylvania avenue, between 14th and 15th streets, in this city. The property is about 103 or 104 feet front on Pennsylvania avenue, running back on an eastern line on an alley I think 104 or 105 feet, and the western line of the lot about 97 feet. The east and west lines are not of the same depth. It has a very old building on it covering the entire front on Pennsylvania avenue, and running back, at the time I took possession of the property under the lease, about 35 or 40 feet. There was an old two-story brick building on the 15 foot alley and bordering also on the 30 foot alley in the rear ; it fronted on the 15 foot alley perhaps 25 feet, and extended west of that width about 50 feet. Between that building and the main building was a yard extending west about 25 or 30 feet, and annexed to that yard, at the west end, was a brick building, two stories, connecting with the main building and the building I have described as fronting on the

54 15 and 30 foot alleys. The intervening building I have mentioned extended west about 20 or 25 feet ; in the northwest corner of the lot was a frame building occupied, I think, as a stable.

When I took the lease the property was in a bad condition, very dilapidated.

Immediately before I took the lease the property was under rent, I think, to Mr. Daniel Rowland, at a rent of $700 per year, I believe.

The words "three hundred and ninety" in the covenant of sale contained in the lease are in the handwriting of Mr. Benjamin Ogle Tayloe. As the lease was drawn by the scrivener, there was a blank where those words occur, and they were inserted by Mr. Tayloe at the execution of the lease. The lease is not in the handwriting of Mr. Tayloe, except the above words mentioned.

On the 15th day of April, 1864, I sent my check for $2,000 on the Bank of America, New York, in a letter to Mr. Tayloe, by my servant, a negro man. The check was made payable to the order of Benjamin Ogle Tayloe.

A copy of that letter I here present. (It is hereunto annexed, marked "Exhibit E. F. B., No. 1.")

On the same day I received an answer to that letter, which I now present. (It is hereunto annexed, marked "Exhibit E. F. B., No. 2.")

That letter returned the check.

The next morning, the 16th of April, I went to Mr. Tayloe's house

and saw him, and told him I had the $2,000 for the cash pay-
55 ment of the Mansion House property due on the 1st day of May, 1864, and offered it to him. I had the money with me, but did not show it to him nor take it out of my pocket.

When I offered him the money he refused to accept it, saying that he understood that the purchase-money was to be paid in gold, and he would not accept green-backs; saying at the same time he would receive the gold and give me the receipt that I desired, being a receipt for two thousand dollars, the cash payment under the covenant of sale contained in the lease. I bid him good morning and left the house.

Next, I sent a white man to the door that same day, named William H. Ward; I gave him two one thousand dollar legal tender notes. Said Ward is since dead; he died about September last.

Interrogatory. When you gave Ward the two one thousand dollar notes, what were your directions to him?

(Objected to by Mr. Fendall.)

Answer. I directed him to call at Mr. Tayloe's house and ask him to accept the same as the purchase-money due on the 1st day of May, 1864, for the Mansion House property—I mean the cash portion of the purchase-money due on that day.

2d int. When did you next see Ward, and what did he report as having been done in pursuance of your directions?

(Objected to as above.)

Answer. He returned to me after from half to three-quar-
56 ters of an hour, and reported to me that he had seen Mr. Tayloe; that he had tendered him the $2,000; that he showed them to him; that he asked Mr. Tayloe to accept the same and give him a receipt, as the cash payment due on the 1st of May, for the purchase of the Mansion House property by me. He reported that Mr. Tayloe replied to him that he would not then receive the money and receipt for it, but desired that he would ask Mr. Willard to bring the original contract respecting the property.

Oral examination continued:

In some days after that I sent Mr. Ward again with the same money.

3d int. What were your directions when you sent him the second time, and what did he report as having been done in pursuance thereof?

(Objected to by Mr. Fendall.)

Answer. I directed him to see Mr. Tayloe and offer him the same bills as before for the cash payment on the purchase of the Mansion House. He came back in about half to three-quarters of an hour and reported to me that he was told at the door that Mr. Tayloe was engaged at could not attend to Mr. Willard's matter at present.

4th int. Did you send him again on the same business? If yea, when, with what directions, and what did he report as having been done in pursuance thereof?

(Objected to as above.)

Answer. I did send him again on the same business a day
57 or two after his second visit; I gave him the same legal-tender notes and the same directions. He came back in half to three-quarters of an hour, and reported to me that he was informed at Mr. Tayloe's door that Mr. Tayloe was out of town, and would not return until the next week.

Oral examination continued:

On repeated occasions I tried to have Mr. Tayloe accept the money. I called upon Mr. Kennedy to prepare the papers to comply with my part in compliance with the lease. Mr. Kennedy did prepare them—a deed and deed of trust.

5th int. State whether you sent Mr. Hazard to Mr. Tayloe with the same money which you sent by Mr. Ward, and the deed and deed of trust prepared by Mr. Kennedy. And if so, what directions you gave him with regard to the money, and especially with regard to the papers.

(Objected to by Mr. Fendall.)

Answer. I sent Mr. Hazard on two occasions between the 25th and 29th of April, 1864. On the first occasion I gave him the two one thousand dollar legal-tender treasury notes, the same that I had sent by Mr. Ward, with the papers that had been prepared by Mr. Kennedy, and asked him to ask Mr. Tayloe to accept the money, receipting the same as the cash payment for the Mansion House property, due the 1st of May; also the papers which Mr. Kennedy had prepared, saying that if Mr. Tayloe desired, to leave the papers
58 with him for examination. I asked him to let Mr. Tayloe keep the papers and examine them if he wished, and report to me any alterations he might want in them, if any he should want. It was on or about the 25th of April that he went the first visit to Mr. Tayloe as above stated. Mr. Hazard returned to me the same day and said he had called there, and he was unable to leave the money or get a receipt for it, as he was told at the door that Mr. Tayloe was not at home.

About three days after I sent him again with the same money, the same papers, and the same directions to Mr. Tayloe's residence. He came back in about half to three-quarters of an hour, and reported that Mr. Tayloe was out of town and would not return till next week. The papers now shown me, marked Exhibits J C. W., 2 and 3, respectively, I recognize as the same blank deed and deed of trust that I sent by Mr. Hazard to Mr. Tayloe.

6th int. Look at the paper now shown you, marked Exhibit J. C. W., No. 3, being the blank deed of trust to which you have testified, and say whether or not by its terms it gave you the right of anticipating the deferred instalments of the purchase-money of the Mansion House property; and if so, why that clause was inserted.

Answer. This deed of trust, if executed, would give me the right to anticipate. It was made out for his examination and acceptance or rejection. I had made a contract of a larger amount with him, with the same privilege in it, which he never objected to, and
59 which contract was drawn by Mr. Tayloe's counsel.

7th int. Was I correct in understanding you to say that on each occasion concerning which you have testified as having sent your agent, Hazard, with the $2,000 in money and blank deed and deed of trust to Mr. Tayloe, that your instructions to said Hazard were, to leave the said blank deeds with him for his examination, and that if after examining they were found by him to be acceptable to him, they were to be respectively executed; but if found in any way objectionable to him they were to be rejected by him, and his objections reported to you?

Ans. Yes, sir.

Oral examination continued:

The Mansion House property is on square No. 225. There was no special reason why I wished to purchase the property, excepting that it was near the property owned by myself and my brother, on the east end of the square, and known as Willards' Hotel. We wanted more room and could use the property to advantage. My brother and myself still own the Willard Hotel property.

8th int. State fully the peculiar benefit to you to be derived from the purchase of the Mansion House property.

Answer. The very special benefit was, at the time we occupied the Carbery & Owen buildings, or with a view to their occupation, we could use the rooms of the Mansion House, by throwing a pas-
60 sage over the alley, as part of our hotel, and for a number of years we so occupied the rooms in the Mansion House; we considered the property valuable to us from its proximity to us in the rear more particularly than in the front. One reason was we had a large ice-house on the rear of the Mansion House lot; we built it; we used the lot for coal and wood, and the rooms in the Mansion House were as good as any of the same class in the hotel for our use. The property was more valuable to us than any other person in the world, provided we could get the control of the two houses intervening between the Willard Hotel property and the 15 foot alley, and irrespective of such control, it was still more valuable to us as the owners of the Willard Hotel property than to any other persons, because of its proximity to the hotel, and it was essential to us that another party should not come there. The considerations of superior value to the owners of the Willard Hotel property still continue.

At 2 p. m. adjourned to Wednesday next at 10 a. m.

(Signed) EDM. F. BROWN, *Examiner.*

WEDNESDAY, 25*th January*, 1865.

The witness continues:

The Mansion House property was very desirable to us as owners and occupiers of the Willard Hotel property, that no other
61 party should occupy the Mansion House property as a hotel. At the time I was in negotiation with Mr. Tayloe for the Willard Hotel property this same subject was brought up, that we desired, and it was specially understood that we wished, the privilege of the right to purchase the Mansion House property rather than to

have another hotel built upon it. It was understood by both that it was very much for our interest to have the control of the Mansion House property, not only from the use that we could make of it in connexion with the hotel, but because we were about to expend large sums of money in repairing the Willard Hotel property and improving it, which outlays of money accrued to the benefit of all the property in that neighborhood. At the time of the negotiation for the Willard Hotel property, which took a number of days, there was a stipulation on the part of Mr. Tayloe that we should have the right to purchase the Mansion House property in preference to other parties, at $22,500, Mr. Tayloe engaging not to sell to any other person the Mansion House property without taking from such person an obligation not to build a hotel on the property within ten years from the date of its purchase. This stipulation was made by Mr. Tayloe, both verbally and in writing, pending the negotiations for the Willard Hotel property. The last clause of the paper which I now present, marked Exhibit E.F.B., 3 contains that stipulation. All of the paper is in the handwriting of Mr. Tayloe. It was given to Mr. Tayloe in the year 1853, pending the negotiation
62 Willard Hotel property. My brother and myself bou
Willard Hotel property in the month of May, 1853. When we bought the Willard Hotel property it was in a very poor condition. It was an old building, and some portions of it were very delapidated. The front wall was cracked and rested upon pine timbers, which rested on a foundation of stone and brick. Between these timbers, which were about eleven feet in height, there were doors and windows, but no brick work. The brick work began at the top of the timbers, which had shrunk and rotted. We took out the front wall entire to the top, and rebuilt, the first story of stone and the others of brick, putting an additional story. In 1855 we tore down an old building on 14th street, in the rear of the hotel, which at the time we bought from Mr. Tayloe was used as a kitchen, but had previously been a stable, and in place of that we built a very handsome building five stories high, fronting nearly fifty feet on 14th street, and running back nearly 60 feet of that height, and beyond it we partly built and partly repaired for temporary use a two-story building of about the same width and about fifty feet deep. The front on 14th street was built and the walls laid with a special view to further improvements. In 1858 we extended the building on 14th street to F street, putting two additional stories on the building which we built in 1855,
63 and making the extension to F street six stories high, until within about forty feet of F street, when it became seven stories high, and continued at that height to F street. We also cleared away the building in the rear of that erected in 1855 on 14th street, and rebuilt to the west line of the lot and on the west connected the building last mentioned with the main building on Pennsylvania avenue.

In 1859, I think, we bought the church property on F street, immediately west of our improvement on that street, and connected the

7th int. Was I correct in understanding you to say that on each occasion concerning which you have testified as having sent your agent, Hazard, with the $2,000 in money and blank deed and deed of trust to Mr. Tayloe, that your instructions to said Hazard were, to leave the said blank deeds with him for his examination, and that if after examining they were found by him to be acceptable to him, they were to be respectively executed; but if found in any way objectionable to him they were to be rejected by him, and his objections reported to you?

Ans. Yes, sir.

Oral examination continued:

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61 party should occupy the Mansion House property as a hotel. At the time I was in negotiation with Mr. Tayloe for the Willard Hotel property this same subject was brought up, that we desired, and it was specially understood that we wished, the privilege of the right to purchase the Mansion House property rather than to

have another hotel built upon it. It was understood by both that it was very much for our interest to have the control of the Mansion House property, not only from the use that we could make of it in connexion with the hotel, but because we were about to expend large sums of money in repairing the Willard Hotel property and improving it, which outlays of money accrued to the benefit of all the property in that neighborhood. At the time of the negotiation for the Willard Hotel property, which took a number of days, there was a stipulation on the part of Mr. Tayloe that we should have the right to purchase the Mansion House property in preference to other parties, at $22,500, Mr. Tayloe engaging not to sell to any other person the Mansion House property without taking from such person an obligation not to build a hotel on the property within ten years from the date of its purchase. This stipulation was made by Mr. Tayloe, both verbally and in writing, pending the negotiations for the Willard Hotel property. The last clause of the paper which I now present, marked Exhibit E.F.B., 3 contains that stipulation. All of that paper is in the handwriting of Mr. Tayloe. It was given to me by Mr. Tayloe in the year 1853, pending the negotiation of the
62 Willard Hotel property. My brother and myself bought the Willard Hotel property in the month of May, 1853. When we bought the Willard Hotel property it was in a very poor condition. It was an old building, and some portions of it were very delapidated. The front wall was cracked and rested upon pine timbers, which rested on a foundation of stone and brick. Between these timbers, which were about eleven feet in height, there were doors and windows, but no brick work. The brick work began at the top of the timbers, which had shrunk and rotted. We took out the front wall entire to the top, and rebuilt, the first story of stone and the others of brick, putting an additional story. In 1855 we tore down an old building on 14th street, in the rear of the hotel, which at the time we bought from Mr. Tayloe was used as a kitchen, but had previously been a stable, and in place of that we built a very handsome building five stories high, fronting nearly fifty feet on 14th street, and running back nearly 60 feet of that height, and beyond it we partly built and partly repaired for temporary use a two-story building of about the same width and about fifty feet deep. The front on 14th street was built and the walls laid with a special view to further improvements. In 1858 we extended the building on 14th street to F street, putting two additional stories on the building which we built in 1855,
63 and making the extension to F street six stories high, until within about forty feet of F street, when it became seven stories high, and continued at that height to F street. We also cleared away the building in the rear of that erected in 1855 on 14th street, and rebuilt to the west line of the lot and on the west connected the building last mentioned with the main building on Pennsylvania avenue.

In 1859, I think, we bought the church property on F street, immediately west of our improvement on that street, and connected the

said church with the hotel by a bridge. From time to time as we have added to the hotel we have furnished and fitted up.

In 1853 our repairs and improvements were about $40,000; in 1855, about $50,000 or upwards; in 1858, from $150,000 to $200,000; and after we bought the church, we expended in and about it from $3,000 to $4.000. These sums are irrespective of outlays for the purchase of ground from time to time. The furniture from time to time has cost certainly not less than $175,000. It is now insured for $100,000, and would certainly sell for upwards of $150,000.

Interrogatory. Has the privilege of purchase in the lease of the Mansion House property had any connexion with the large expenditures to which you have testified? If yea, what?

64 Ans. I have always regarded that the expenditures that I would make on the Willard Hotel property would benefit all the property in the immediate neighborhood, and especially the Mansion House property, from its position relative to the hotel, and from the uses that we could make of it.

Oral examination resumed:

In 1854, when I took the lease of the Mansion House property, its market value, in my opinion, was not $15,000. If sold for one-third cash and the balance in one and two years, it would not have brought that amount in my judgment.

Running the west line of the Mansion House property through to F street it would cut the house occupied by Mr. Causten, next east of the large building owned by Mr. Corcoran, at the corner of F and 15th streets.

The Mansion House lot, if extended through to F street by bridging the alley in the rear, would be a very advantageous site for a hotel.

Cross-examination, by W. Y. Fendall, esq., counsel for the defendant:

I think the first time that I saw Mr. Tayloe was in New York, at the Astor House, in 1847 or 1848; it might have been 1846. I was cashier of the Astor House at the time. At the time my brother and I purchased Willards' Hotel in 1853 I was in the employ of

65 Howland & Aspinwall in San Francisco, in the Pacific Mail Steamship Company's office. I was the passage clerk in the office. My brother and I purchased Willards' Hotel from Benjamin Ogle and William H. Tayloe, and we agreed to pay $70,000 for it. The terms of the sale were a cash payment of $10,000, and to make it equivalent to cash we were to secure the $10,000 upon other property than the hotel property. The balance was to be paid $2,000 per year of the principal, with interest on the unpaid portion of the purchase-money. This was to continue, I think, for ten years, at the end of which period the payments were to be $3,000 per year, with interest upon the deferred payments. At the time of the purchase there was not any actual cash payment made. The deed of trust will show the terms of payment. I think that the deferred payments

were also to be secured by my insuring the property and assigning the policy of insurance to the Messrs. Tayloe.

Int. Was the insurance effected, and did you assign the policy to the Messrs. Tayloe, or to the trustees?

(Objected to by the counsel for the complainant because irrelevant to the issues in this cause.)

Answer. I know that insurance has been effected in Mr. Tayloe's name. I don't remember the amount, nor particularly about it.

66 Int. Did either of the Messrs. Tayloe, or the trustees, apply to you for the assignment of the policy?

(Objected to as above.)

Answer. I don't remember that they did.

3d x-int. Were the instalments and the interest paid by you as agreed on?

(Objected to as above.)

Answer. Yes, sir.

4th x-int. Were you also to pay rent for the Willard Hotel?

(Objected to as above.)

Answer. Not to my knowledge.

5th x-int. At the time of the alleged tender of $2,000 to Mr Tayloe, were you indebted to him on any other account other than that the Mansion House?

Answer. Not to my knowledge.

Oral examination resumed:

From the west line of Willards' Hotel to the 15 foot alley on Pennsylvania avenue, of which I have spoken, I think it was about 50 feet, and is occupied by two houses. The lot adjoining the hotel (the Carberry lot) extends back about 54 feet to the L of an alley. The lot bordering on the 15 foot alley, owned by Mr. Owen, is entirely covered by buildings, and extends to the 30 foot alley, but is not of the same width at the alley that it is in front. The building is, however, of the same width front and rear, it occupying a portion of the alley.

67 I cannot remember whether at the time I leased the Mansion House from Mr. Tayloe we occupied either of the said buildings in connexion with the Willard Hotel, but think it possible we occupied the Carbery house. The upper part of the Carbery building is now occupied as part of Willard's Hotel, but no part of Owen's building.

The Mansion House property rents now, I believe, for about $600 per month.

Int. Have you paid the defendant the rent which you agreed in the lease to pay him for the occupation of the Mansion House property?

Answer. The receipts in my possession will show. My recollection is that I have paid everything that was due on it.

Int. Have you paid Mr. Tayloe rent at the rate of $1,200 per year up to the 1st day of May, 1864?

Answer. I shall have to refer you to the receipts, they show.

Int. Independent of the receipts, can you state whether you have paid this rent of $1,200 per year for a period of 10 years, beginning with the 1st of May, 1854?

Answer. I have Mr. Tayloe's receipt in full of all demands to that period for rent.

At the time the lease was to give me possession of it it was occupied under a lease, and the tenant had not received a proper notice to quit in time to put me in possession of it from the com-
68 mencement of my lease. It was under a rent to him of $700 per year, and while he continued in it, Mr. Tayloe accepted from me the amount that said tenant was to pay. That tenant probably continued in it about a year, but I cannot state exactly. I had to have a jury to disposses that tenant. I think it possible that after that time Mr. Tayloe willingly accepted the rent at the rate of $700 per year, but I cannat say how for long.

Certainly in the year 1856 or 1857 I commenced paying Mr. Tayloe at the rate of $1,200 per year. After I commenced so to pay $1,200 per year, I continued to pay the same to the end of the lease.

Oral examination resumed:

The paper marked "Exhibit E. F. B, 3," was given to me by Mr Tayloe before the execution of the deed of the Willard Hotel property. This deed and the deed of trust consummated my agreement with the Messrs. Tayloe in relation to the Willard Hotel property.

The lease for the Mansion House property, filed as an exhibit in this cause, is in the handwriting of Mr. Wright, who was a clerk in Willard's Hotel. The lease was, I think, signed at Mr. Tayloe's house.

Int. At the time of the signing of the lease, did any conversation take place between you and the defendant in regard to the
69 covenant giving you the right to purchase the Mansion House?

(Objected to because the covenant cannot be varied by parol proof, and is admitted by the answer of defendant in the cause.)

Answer. None that I remember, except in relation to the blank in the covenant, which had been left owing to my not knowing the amount of the ground rent. I called Mr. Tayloe's attention to it, and he took his pen and wrote the amount.

Int. Did not the defendant at that time object to signing the lease containing this covenant? and did you not tell him that it made no difference, as it would never be enforced, and that no one would pay him as much for the property within the ten years limited by the lease as the covenant called for, or words to that effect?

(Objected to as above.)

Answer. The defendant did not object to signing the lease; I did not tell him it made no difference and it would never be enforced, or that nobody would give the amount.

Oral examination resumed:

I had not complainant's exhibits 2 and 3 in the cause when I called on Mr. Tayloe on the 16th of April, 1864; I received them between

that time and the 29th day of April, but cannot state the precise day; I cannot say how long I had them in my possession before I handed them to Mr. Hazard, nor can I tell when I gave them to Mr. Hazard; I think it was the same day that I first sent him to Mr. Tayloe's; I cannot tell the exact time of day, but know it was between 9 a. m. and 3 p. m.

I called on Mr. Tayloe on the 16th of April, as requested in a note from him on the previous day; he was at breakfast when I reached the house. His servant asked me into the parlor and handed me the National Intelligencer, saying Mr. Tayloe would join me in a few moments. Mr. Tayloe came into the room in a few moments, and I said that I had called and was ready to pay Mr. Tayloe the money that was due on the first day of May, as the cash payment for the purchase of the Mansion House property. Mr. Tayloe's answer was, that his understanding was that the amount was to be paid in gold. I asked him if he would receive of me legal-tender treasury notes, and give me a receipt. He said he would not. I immediately took my leave. In going down the steps I might have asked him to give me the note I had sent him the previous day enclosing the check, but I have no remembrance whatever of it. I don't remember that he told me at that time that he was unwell, but he had told me on previous occasions that he was feeble. He said he was ready to carry out the contract. I don't remember that anything was said about contracts by him, but he said pay me the gold and I will give you a receipt. Very few words passed between us. I did not take the money out of my pocket, but told Mr. Tayloe I had it and was ready to pay it.

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At 3½ p. m. adjourned till to-morrow at 10 a. m.

(Signed,) EDM. F. BROWN, *Examiner.*

THURSDAY, 26*th January*, 1865.

Met pursuant to adjournment.

Cross-examination continued:

Mr. William H. Ward, whom I sent to Mr. Tayloe, kept a restaurant opposite Willards' Hotel. The restaurant kept by Mr. Ward and Willards' Hotel are, respectively, about 3½ squares from Mr. Tayloe's residence. I remember of giving Mr. Ward similar instructions on each of the three occasions that I sent him to Mr. Tayloe's. I gave Mr. Ward papers and money to give to Mr. Tayloe. The papers were a blank receipt for him to sign, and I think I gave him a deed for him to sign for the property, and the deed of trust, which, if satisfactory to him, could be executed. I might have first sent the deed and deed of trust to Mr. Tayloe by Mr. Ward, but I cannot say whether I did or not. I know I sent them by Mr. Hazard. I cannot say how many days elapsed between the last time I sent Mr. Ward and the first time I sent Mr. Hazard to Mr. Tayloe's residence. It was Mr. Hazard or Mr. Ward who first informed me that Mr. Tayloe was out of town—I cannot say which. I might have sent Mr. Ward to Mr. Tayloe's residence the third time before I sent Mr. Hazard at all.

Int. Of your personal knowledge, independent of what you have heard from others, do you know that either Mr. Ward or Mr.
72 Hazard went to Mr. Tayloe's residence, or that either of them saw him relative to the purchase of the Mansion House property?

Ans. I do not.

Oral examination resumed:

Mr. Ward told me that he had seen Mr. Tayloe at his (Tayloe's) house. He did not tell me that he entered the house. He did tell me he had showed Mr. Tayloe the money. I don't recollect whether he said he offered Mr. Tayloe anything else but the money.

At the time of Mr. Ward's first visit to Mr. Tayloe I think he had not the deed and deed of trust filed as exhibits in this cause. I think I did hand them to Mr. Ward some time between the 16th and 29th of April. I cannot with certainty be any more precise as to the time. I did not, in answer to Mr. Tayloe's request made through Mr. Ward, send or take to Mr. Tayloe the original contract in regard to the sale of the Mansion House property. It was on record at the City Hall, and Mr. Tayloe could get a copy of it if he wanted it. I had already sent, at the request of Mrs. Tayloe, some time in 1860, a copy of the lease of the Mansion House. I have no knowledge that Mr. Tayloe was about to sell the Mansion House property, or that he was in negotiation for selling the same, at the time I sent the copy of the lease in 1860.

Int. At or about the time you sent a copy of the lease to Mrs. Tayloe, did you have any conversation or correspondence with Mr. Tayloe in regard to a sale by him to a third party of the premises
73 in dispute?

(Objected to because irrelevant.)

Answer. I think not.

Int. Did you receive a letter from Mr. Tayloe on that subject?

(Objected to as above.)

Answer. Not that I remember of.

Oral examination resumed:

I think the same day that I received the deed and deed of trust from Mr. Kennedy filed in this cause. I sent them to Mr. Tayloe by Mr. Ward or Mr. Hazard.

I think my direction to Mr. Ward on his third visit was, to leave the papers with Mr. Tayloe for his examination, if he desired it. My instructions were also to tender him the money as the cash payment on the Mansion House property due the 1st of May. I am certain I did send these papers by Mr. Ward. I cannot say the precise hour of the day that I got the papers from Mr. Kennedy, but it was between 9 and 3 o'clock. I cannot remember by whom I first gave the papers after I received them from Mr. Kennedy. I gave them either Mr. Ward or Mr. Hazard, but I cannot say which. I do not remember that I had sent Mr. Hazard to Mr. Tayloe's prior to my receiving the papers from Mr. Kennedy. I might have sent Mr. Ward to Mr. Tay-

loe's before I received the deed and deed of trust from Mr.
74 Kennedy. I certainly sent him three times, and always with the money. When I said that on repeated occasions I endeavored to have Mr. Tayloe accept the money, I meant that such occasions were prior to the 1st of May, 1864. I refer to my letter of the 15th enclosing the check, my interview of the 16th, and my efforts through Ward and Hazard. Mr. Ward did not tell me that he found Mr. Taylor was sick on any of his visits. I gave Mr. Ward and Mr. Hazard similar directions, I think, on each occasion. I cannot remember how many days elapsed between Mr. Ward's first and second visit.

Int. Do you know how many days elapsed between Mr. Ward's third visit and Mr. Hazard's first visit?

Answer. Not precisely. It might have been two days—it might have been three days.

Int. Did you know or had you reason to know at the time you were sending Mr. Hazard and Mr. Ward to Mr. Tayloe, that Mr. Tayloe was sick?

Answer. I did not.

Int. Who is now in possession of the Mansion House?

Answer. I am.

Int. When did you first apply to Mr. Tayloe to get a deed for the Mansion House property?

75 Answer. In my note of 15th April, 1864, I think; I have no remembrance of applying to him before that time.

Int. Had you and your brother rented the property now known as Willards' Hotel, prior to the time you purchased the same of the Messrs Taylor?

Answer. No, sir. My two brothers, Henry and Edward, had leased for some years from Mr. Tayloe the property, before my brother Henry and myself bought it in 1853.

Int. How old apparently was the front wall of Willards' Hotel, which you pulled down, when you purchased the property from the Messrs. Tayloe?

Answer. I have no certain knowledge, but presume it was about five years old.

Int. When was it that you first had any connexion with Willards' Hotel?

Answer. In 1853.

Int. What capital had you at the time you became part purchaser of Willards' hotel?

(Objected to as irrelevant.)

Answer. I don't remember the exact amount. I presume I had about $20,000 in property and money. That does not include the value I put upon myself.

Int. Did the fact of your presumed right to purchase the Mansion House property cause you to enlarge Willards' Hotel as you have
78 described, or was it for the purpose of giving increased accommodations to the guests of your hotel?

Answer. I always thought that the improvement of the Willard

Hotel property would redound to my advantage from my having the right to purchase the Mansion House property. It was also to give increased accommodations to the hotel.

Int. Before and after you made these improvements, did you not find it necessary to rent other houses, independent of the Mansion House, for the purpose of carrying on your hotel? If so, what were those houses?

Answer. We sometimes rented other houses, the Carbery house, Owen's house, and occasionally rented rooms on the east side of 14th street.

At 12, noon, adjourned to Saturday next, at 12, noon.

(Signed) EDM. F. BROWN,
Examiner.

SATURDAY, 28*th January*, 1865.

Met pursuant to adjournment.

Cross-examination continued:

On account of the absence of some papers which the counsel for defendant desired to present, by consent of counsel, the further taking of testimony in this cause is adjourned until Monday next, 30th inst., at 10 o'clock a. m.

(Signed) EDM. F. BROWN,
Examiner.

79 MONDAY, 30*th January*, 1865.

Met pursuant to adjournment.

Mr. Tayloe might have returned me the first blank deeds which I sent him some time between the 16th and 29th of April, 1864. I don't remember whether they were returned to me before or after I sent by Mr. Hazard or Mr. Ward the blank deeds prepared by Mr. Kennedy, and filed as exhibits in this cause. When I sent the deeds prepared by Mr. Kennedy, the first deeds might have been in Mr. Tayloe's possession, and might have been in mine. I do not remember. The first deeds might have been *been* returned to me by Mr. Tayloe. I do not remember distinctly. I have no remembrance on the subject beyond what I have stated. I do not remember particularly about receiving a letter from Mr. Tayloe dated 23d April, 1864, returning the two first deeds in blank to me. It might have been, and might not. My memory is not fresh upon it. My remembrance about receiving a letter from Mr. Tayloe returning two blank deeds is so indefinite that it is no remembrance. If I received the two first blank deeds from Mr. Tayloe, I have no remembrance of having made any reply upon the subject.

Mr. Tayloe may have written me a letter of a similar purport to that now shown me, marked exhibit "E. F. B., No. 4." He may have sent me such a letter. It is difficult to say positively that he did.

Int. Do you remember receiving from Mr. Tayloe, on or
80 about the 23d day of April last any letter whatsoever?

Answer. I can't remember positively the date.

Int. Did you, on or about that time, receive any letter? and if so, where is that letter?

Answer. I did, and it is filed as an exhibit in this case.

Int. On or about the 23d day of April last, did you receive any other letter from Mr. Tayloe relative to the Mansion House property, except that which is filed as an exhibit in this cause? and if you did, where is such letter?

Answer. I might have, but my memory is not fresh on the subject.

Int. Can you say whether you did or did not receive a letter from the defendant returning to you the two first deeds in blank which had been sent by you to the defendant?

Answer. I think I received an envelope inclosing the deeds, but I do not remember as to a letter.

Int. Were these deeds returned to you by Mr. Tayloe?

Answer. I think they were. I cannot state when, nor by whom they were returned.

Oral examinations resumed:

I presume that in 1860 I sent the copy of the lease to Mrs. Tayloe at her request. I think I remember Mrs. Tayloe requesting me to send a copy of the lease. I presume her object in requesting me to send her a copy of the lease was to save her the trouble of sending to the City Hall to get a copy of it.

81 Int. At that time, in 1860, had there been any misunderstanding between you and the defendant in regard to said lease, or any difference between you in relation to the same, or any conversation about it?

(Objected to by counsel for complainant because irrelevant.)

Answer. About that time there was between Mr. Tayloe and myself some conversation relative to the Mansion House property. I do not remember what it was.

Oral examination resumed:

I think very likely I had a correspondence with Mrs. Tayloe on the subject about that time. I say I think it very likely. I have a large number of letters, and I might find these letters. I will examine my letters, and produce, if desired, all letters having any bearing on the Mansion House property. I think there was correspondence about that time. I presume I have preserved the letters written by Mrs. Tayloe to me on that subject.

Int. Look at the letter now shown you, marked Exhibit E. F. B., No. 5, and say whether it is in your handwriting, and you sent the same to Mrs. Tayloe?

(Objected to because irrelevant.)

Answer. This is certainly my handwriting, and I presume I sent it to Mrs. Tayloe.

82 Int. To what transaction is it that in said letter you apply the expression, "I am very sorry you should think my course an unjust one?"

(Objected to as above.)

Answer. I don't remember.

Int. Where is the note to which this is a reply?

(Objected to as above.)

Answer. I do not remember.

Int. Have you now any remembrance of any conversation which you may have had with Mrs. Tayloe in regard to the property in dispute?

(Objected to as above.)

Answer. No precise remembrance—nothing more than I have stated.

Int. Were you in the habit of visiting Mr. Tayloe's house for several years previous to April, 1864, and up to that time?

(Objected to as above.)

Answer. I have been there a great number of times between 1853 and 1864.

Int. Before April, 1864, had you required Mr. Tayloe, or asked of him, to convey to you the property in dispute?

(Objected to as above.)

Answer. I don't think I did.

Int. After Mr. Ward had returned to you and stated as you have testified that he had tendered to Mr. Tayloe the cash payment on account of the Mansion House property, why was it that you

83 again sent him, and subsequently Mr. Hazard?

Answer. I wished there to be no fault on my part in tendering the cash payment for the Mansion House property before the time that it was due according to the lease under which I claim it. I have no other reason.

Int. Can you now state when you first learned that the defendant had left the city of Washington, and from whom you first learned it?

Answer. I think it was through Mr. Ward or Mr. Hazard, or perhaps both of them. I cannot state precisely. I have already answered it as well as I could, in my former evidence.

Int. Did Mr. Ward tell you when, where, and in whose presence he saw Mr. Tayloe, when, as you have testified, he said he tendered him the $2,000?

Answer. He said it was at his (Mr. Tayloe's) house. He did not say the precise time, and did not say whether any one was present.

Int. Did he say it was *in* Mr. Tayloe's house?

Answer. I think he said he had been to Mr. Tayloe's house, and offered him the money. He said he had been *to* Mr. Tayloe's house, and saw Mr. Tayloe; he did not say whether it was in the parlor, or passage, or dining room, or where.

Int. When did you first come to the city of Washington and

84 take part in the management of the Willard hotel property?

Answer. In the year 1853. I think in the month of April.

Adjourned to Wednesday next at 3 p. m.

(Signed) EDM. F. BROWN, *Examiner.*

WEDNESDAY, 1*st February*, 1865.

Met pursuant to adjournment.

Re-examination:

Int. You have stated on your cross-examination that the Mansion House now yielded about $600 per month. How long has it yielded about that amount?

Answer. I should say three or four months past.

Int. State as near as you can what it yielded before that time?

Answer. In 1854, it would bring perhaps $700 or $800 per year, perhaps more, perhaps less. About the same for 1855 and 1856. In 1857 and 1858, to the the best of my remembrance, it yielded me a little more, not very much, I cannot tell exactly. In 1859 and 1860, it yielded a little more than that—perhaps, $1,200 or $1,500. In 1861, I think the building yielded me from $1,800 to $2,000. In 1862, about the same, perhaps less; a good deal of the time it was vacant,
85 portions of it. In 1863, it would not vary much from the same; some portions of it were vacant part of the time. In 1864, I think, the whole of it might have yielded me $3,000.

Int. You were also interrogated as to whether any rent was due on the Mansion House property under the lease thereof. Have you the receipts for rent for 1863 and 1864, until the expiration of the lease? If yea, produce them.

Answer. I have the receipts, and now produce them.

(They are hereunto annexed, marked respectively Exhibits E. F. B., No. 6, to 11, inclusive.)

Int. You have also stated that you have no knowledge that Mr. Tayloe was about to sell the Mansion House property in 1860; and you further stated that there was no correspondence in that year between you and Mr. Tayloe, touching the property; and you also said there might have been such correspondence in that year, and that you are willing to produce any such correspondence. Have you made an examination or search for such correspondence, and with what result?

(Objected to by Mr. Fendall.)

Answer. I have; and found that there was some such correspondence.

Int. Produce the same.

(They are hereunto annexed, marked Exhibits E. F. B., 12, 13, 14.)

Int. What answers did you make to the said letters?

Answer. The answers to the letters of Oct. 2 and Oct. 12,
86 1860, I mean copies of my answers, are appended to said letters. I have no recollection of having answered the letter of Oct. 3, 1860. I cannot find any.

Int. You have also said in your cross-examination that you did not know that the two deeds returned to you by Mr. Tayloe were accompanied by a letter under date of April 23, 1864. Have you endeavored to ascertain whether said deeds were returned with a letter of that date, or any date? and if so, state what the fact is?

Answer. I have found a letter that was sent to me about that time, I think with the deeds which were returned.

Int. Produce that letter if you please.

(It is hereunto annexed, marked "Exhibit E. F. B., 15.")

Int. In your cross-examination your attention was called to the letter marked Exhibit E. F. B., No. 5, now shown you, and you were asked to what transaction you applied the following expression in that letter, "I am very sorry you should think my course an unjust one," and you were further asked where was the note to which Exhibit E. F. B., No. 5, was a reply, and you could not remember. Can you now state whether said letter, marked Exhibit E. F. B., No. 5, or the above expression in it, had any relation directly or indirectly to the Mansion House property? And have you the note to which that letter was a reply?

87 Answer. I can state that I have the note to which I sent that as a reply, and that it had no connexion whatever with the Mansion House property.

(Answer objected to by Mr. Fendall.)

Int. Produce the letter to which Exhibit E. F. B., No. 5, was a reply, and state when and where you found it, and your reason for stating that it is the note to which Exhibit E. F. B., No. 5, is a reply?

Answer. This is the note. (It is hereunto annexed, marked Exhibit E. F. B., No. 16.) I found it among my papers in searching for the correspondence between Mr. Tayloe and myself, in 1860, which I have just produced. I made the search since my last examination at this office. In my search for the letters, I found this letter and a copy of the answer to Mrs. Tayloe folded up and filed away with this identical letter in one envelope.

Int. Have you the copy of the answer to Mrs. Tayloe which you found folded up and filed away as you have stated? If so, produce the copy?

Answer. I have, and now produce it.

(It is hereunto annexed, marked Exhibit E. F. B., 17.)

Int. How did you find them folded up together?

Answer. They were in an envelope together. The answer was folded in the letter, and both in an envelope.

Int. produce the envelope.

Answer. Here it is.

(It is hereunto annexed, marked Exhibit E. F. B., 18.)

88 Int. Have you read this letter from Mrs. Tayloe to you, and your letter in response?

Answer. I have.

Int. Can you now state, with your memory thus refreshed, with certainty to what letter Exhibit E. F. B., No. 5, was a response?

Answer. I can. Exhibit E. F. B., No. 5, was a response to the letter from Mrs. Tayloe, which I have just handed you, marked E. F. B., 16—(16.)

At 4¾ p. m. adjournment to to-morrow at 3 p. m.

EDM. F. BROWN, *Examiner.*

THURSDAY, 2*d February*, 1865.

Met pursuant to adjournment.

On account of the indisposition of the expected associate counsel for the defendant, by consent, the further taking of testimony in this case is—

Adjourned until to-morrow at 12 o'clock, noon.

EDM. F. BROWN, *Examiner*.

FRIDAY, 3*d February*, 1865.

Met pursuant to adjournment.

X-int. From the time that you commenced paying Mr. Tayloe $1,200 per year rent for the Mansion House property, did you continue to pay him at that rate up to May 1st, 1864?

Answer. I did, sir.

X-int. Have you any receipts for this rent prior to the
89 receipts already filed in this cause? If so, be pleased to present them.

Answer. I have, and here present them.

(They are marked, respectively, Exhibits E. F. B., 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, and 38.)

I took receipts regularly, but these are all that I have been able to find. I will make another search if desired—(which is requested by the counsel for the defendant.)

X-int. Be pleased to look at the receipts now shown you, marked, respectively, Exhibits E. F. B., 35 and 38, and say in whose handwriting the body of these receipts is.

Answer. It is my own.

X-int. Did you find these receipts which you have produced this morning among your own private papers?

Answer. I did.

X-int. Had you any other correspondence in regard to the purchase of the Mansion House property somewhere about the year 1860, with Mr. or Mrs. Tayloe, other than that which you have produced here? If you have, please produce such correspondence.

(Objected to by counsel for petitioner, because, 1st, the question assumes, contrary to the fact, that he has produced a correspondence between himself and Mrs. Tayloe in relation to the Mansion House property; and, 2d, because any correspondence between Mrs. Tayloe and himself is irrelevant to the issue.)

Answer. I am quite certain I had none with Mr. Tayloe, I
90 might have had some with Mrs. Taylor, but I have none with me.

X-int. If you did have such correspondence, will you please produce it?

(The production of correspondence with Mrs. Tayloe objected.)

Answer. I have it not with me, but will make a search.

X-int. Can you now state whether you received the letter marked Exhibit E. F. B., 15, before or after you directed either Mr. Ward or Mr. Hazard to go, as you have already testified, to Mr. Tayloe's?

Answer. I think I received it before I sent Mr. Ward or Mr. Hazard to Mr. Tayloe's.

X-int. Have you any other reason than that which you have already stated for saying that Exhibit E. F. B., No. 5, is an answer to Exhibit E. F. B., No. 16?

Answer. Independent of finding the letters together, having read the letters and having my memory thereby refreshed, I distinctly remember the subject-matter of that correspondence, and have no doubt that the one is the answer to the other.

X-int. Did you keep any book or account showing the amount you paid Mr. Tayloe for rent of the Mansion House property, from May 1, 1854, to May 1, 1864? If so, please produce it.

Answer. Yes, sir. I kept an account of it, and will produce it.

At 1½ p. m. adjourned to 3 p. m. to-morrow.

(Signed) EDM. F. BROWN, *Examiner.*

91 SATURDAY, *4th February*, 1865.

Met pursuant to adjournment.

The witness appears and produces his ledger, containing as he testifies, the only account he ever had in regard to the Mansion House property, and offers a copy of the account, but declines to let the book go out of his possession, for the purpose of being filed as an exhibit. He offers the book and account to the inspection of the solicitor for the defendant.

X-int. Be pleased to look at the book which you have now in your possession here, and state what sums you paid the defendant on account of the rent for the Mansion House property, and when you paid the same to him?

Answer. August 5, 1854, $175; Dec. 14, 1854, $175; Feb. 3, 1855, $175; May 9, $175; Nov. 8, $175; March 3, 1856, $175; May 16, $175; Aug. 6, $175; Nov. 3, $175; Jan'y 2, 1857, $175; May 2, $175; Aug. 8, $175; Dec. 21, $175; April 6, 1858. $175; Aug. 3, $300; Nov. 24, $300; March 16, 1859, $300; May 2, $300; Oct. 29, $300; Jan'y 30, 1860, $300; Feb. 6, $300; April 23, $300; Sept. 8, $300; Oct. 3, $300; Feb. 1, 1861, $300; April 3, $300; July 31, $300; Sept. 28, $300; Dec. 23, $300; May 1, 1862, $300; Nov. 1, $600; Jan'y 6, 1863, $300.

That is all my book shows as regards payments to Mr. Tayloe, for rent.

92 X-int. From what book is it that you gather the amounts which in your last answer you say you paid to Mr. Tayloe for the rent of the Mansion House property?

Answer. From the ledger of J. C. & H. A. Willard.

X-int. By whom was that ledger kept?

Answer. The book-keeper, Mr. Wright. There was a portion of the time that Mr. Wright was sick, and it was then kept by another person in the place of Mr Wright.

X-int. For whom was Mr. Wright book-keeper?

Answer. He was the book-keeper for J. C. & H. A. Willard, but at the same time he kept accounts which were private accounts for myself, and also private accounts for my brother Henry.

X-int. Did the payments on account of the rent for the Mansion House property enter into the private accounts of yourself or of your brother?

(Objected to because the question assumes that payments for rent of the Mansion House property were made by H. A. Willard, which the witness has not said.)

Answer. I have stated just before, that this is the only account into which payments for rent to Mr. Tayloe, on account of the Mansion House property, were entered, and this is my own private account.

X-int. State if the payments on account of the Mansion House property entered into the accounts of the firm of J. C. & H. A. Willard.

(Objected to, because it has nothing to do with the case.)

93 Answer. I have said that this is the only account into which payments to Mr. Tayloe on account of the Mansion House property entered.

X-int. State if the payments or any of them, on account of the rent of the Mansion House property, were entered in the accounts of the firm of J. C. & H. A. Willard; and if so, from what time to what time?

(Objected to as above.)

Answer. They were not entered into the accounts of J. C. & H. A. Willard, and when I made a payment on account of the Mansion House property it was made for my own especial account, and on my property, and not charged to J. C. & H. A. Willard.

X-int. Look at the enteries in the ledger of J. C. & H. A. Willard, dated respectively, and to which you have already testified, Jan'y 30, 1860, Sept. 8, 1860, Oct. 3, 1860, April 3, 1861, and Jan'y 6, 1863, and state if any alterations or erasures have been made in the said entries; and if so, by whom.

Answer. In the entry of Jan'y 30, 1860, there appears in the date column an erasure of the figures "1860," and the letter J. In the entry of Sept. 8, 1860, in the date column, the figure 8, has been written over 4. The next entry of Oct. 3, 1860, contains no erasure, but there seems to be an erasure underneath it. It is the last entry on the debit side of that page, and is about three-fourths down

94 the page. The entry of April 13, 1861, contains no erasure, nor is there any in the entry of Jan'y 6, 1863. I have no knowledge by whom the above erasures were made, but I presume by Mr. Wright the book-keeper. My pen never touched the book.

X-int. Does the entry in the ledger to which you have referred, dated Jan'y 6, 1863, show to whom the amount was paid?

Answer. It does not. The entry is in these words, "Jan'y 6, 1863, cash, 1 quarter rent to Feb'y 1st, $300."

In obedience to the call made yesterday, the witness here produces two letters written to him by the wife of the defendant, together with the answers and an envelope. (They are hereunto annexed, marked, respectively, Exhibits E. F. B., 39 and 40.)

(The counsel for the complainant objects to the production of the letters, because not pertinent to the issue.

The counsel for the defendant objects to the introduction of the opinion of Mr. Bradley, indorsed on Exhibit E. F. B., 40.)

X-int. Have you now produced all the correspondence passed between you and Mr. or Mrs. Tayloe in the year 1860, or thereabouts, relative to the Mansion House property?

Answer. I have, so far as I have been able to find.

Re-examination:

Int. When did you receive Exhibits E. F. B., 39 and 40?

Answer. Exhibit No. 39 I received in the morning, October 9, 1860. I know that from my answer. Exhibit No. 40
95 I received in the afternoon of the same day, after half-past three o'clock. I know this because it is dated at that hour by the writer.

Int. When you received Exhibit E. F. B., No. 39, what did you do in relation thereto?

(Objected to by counsel for defendant.)

Answer. I first went to Mr. Bradley, my counsel, and asked him to give me a proper reply to the note.

Int. What was that reply?

(Objected to as above.)

Answer. The paper I have filed, E. F. B., No. 39.

Int. What did you do with that reply?

(Objected to as above.)

Answer. I copied the reply and sent it to Mrs. Tayloe, with the copy of the lease to which I have before referred *to* as having sent to Mrs. Tayloe.

Int. Can you recollect whether you answered Exhibit E. F. B., No. 39, before the receipt of Exhibit E. F. B., No. 40?

Answer. I did.

Int. On receipt of Exhibit E. F. B., No. 40, what answer did you send thereto, and when?

Answer. The answer is annexed, and I sent it immediately on the receipt of the letter.

Int. What is the writing on the 4th page of Exhibit E. F. B., No. 40, and how came it there, and whose handwriting is it?

(Objected to by counsel for defendant.)

96 Answer. It is an opinion as to my rights under the lease which I held of defendant for the Mansion House property. It was written by Mr. Bradley at my request and as my counsel, and is in his handwriting.

Int. After the correspondence between you and Mr. and Mrs. Tayloe, 1860, to which you have referred, was your right to purchase, under the covenant in the lease, denied or questioned by either of them until April 1864, so far as you know?

Answer. It was not.

It being a quarter past five, the counsel for the complainant asks an adjournment until Tuesday next, the 7th inst., at 7 p. m., which being assented to by defendant's counsel, adjourned accordingly.

(Signed) EDM. F. BROWN, *Examiner.*

TUESDAY, *7th February*, 1865.

Met pursuant to adjournment.

Int. State for what reason, or at whose instance, you, in the month of August, 1858, paid as rent for the Mansion House property at the rate of $1,200 per year, instead of the previous rate of $700 per annum?

(Objected to by Mr. Fendall.)

Answer. When I went to carry the money to Mr. Tayloe, I carried the same amount that I had been carrying, at the rate of $700 per year. Mr. Tayloe said he would not receive that, and that
97 I must commence from then and pay according to the lease, which was at the rate of $1,200 per year.

Int. State whether at any time Henry A. Willard paid the rent, or any portion thereof, or contributed to the payment of the rent of the Mansion House property?

(Objected to by Mr. Fendall.)

Answer. He never did from his money. I mean that if, at any time, he paid the rent, it was a payment for my property, and on my account, and so understood by him.

The witness here produced a copy of the Mansion House account contained in the ledger heretofore produced, and submitted said copy to the inspection of the solicitor of the defendant, and offered said copy as an exhibit to be filed by the examiner, if said solicitor should so desire.

Counsel for defendant declines further cross-examination of this witness.

The witness having read over his foregoing testimony as written, desires, before signing it, to make the following corrections therein, viz:

1st. At page 20, line 27, he is made to say that at the time he and his brother purchased Willards' Hotel, in the year 1853, he, the witness, was in the employment of Messrs. Howland & Aspinwall, when he said, or meant to say, that shortly before that time he was
98 in the employment of said Howland & Aspinwall.

2d. At page 25, line 10, he is made to say, that he certainly, in the year 1856 or 1857, commenced paying Mr. Tayloe at the rate of $1,200 per annum; to which he desires to say that, since referring to his receipts which he has filed in the case, he finds that he commenced paying at the rate of $1,200 per year in the year 1858, and he is now satisfied he was mistaken in fixing said payment in 1856 or 1857.

(Signed) J. C. WILLARD.

Sworn to and subscribed this 7th day of February, 1865, before me.

(Signed) EDM. F. BROWN,
Examiner in Chancery.

[50-cent revenue stamp.]

FRIDAY, 10*th February*, 1865.

Met pursuant to adjournment.

William H. Ward, being duly sworn, doth depose and say as follows, in answer to interrogatories proposed by counsel for the petitioner:

I reside in Washington city; am in my 47th year, and a lawyer by profession. I was admitted to the bar in this city in 1845, and have practiced law ever since in this district.

99 My specialty, in my profession, is the examination of titles to real estate and conveyancing.

In the absence of a special contract where real estate is sold on credit, or part cash and part credit, the custom is for each party to pay for the deed he keeps. The vendee pays for the deed, and the vendor for the deed of trust or other security given for the deferred payments.

It is understood to be the privilege of the vendee to have the deed prepared by his own counsel or attorney, and for the vendor to have the deed of trust prepared by his attorney. For the past fifteen years I have been continually and constantly engaged in the business above stated. In cases where there is no deed of trust given the vendee pays for and has prepared his deed.

Cross-examination by counsel for defendant:

X-int. In point of fact are not both deed and deed of trust ordinarily prepared by and at the expense of the vendee?

Answer. No, sir; they are not in the absence of a special agreement to that effect.

2d x-int. Is not that the usual agreement between the parties?

(Objected to by counsel for petitioner.)

Answer. No, it is not.

3d x-int. Is the deed of trust for deferred payments always expected to be given upon the property sold and conveyed?

100 Answer. Where the deferred payments are to be secured by deed of trust, it is expected to be upon the property conveyed.

(Signed) WM. H. WARD.

Sworn to and subscribed before me this 10th day of February, 1865.

(Signed) EDM. F. BROWN,
Examiner in Chancery.

[5-cent rev. stamp.]

At 3¾ p. m. adjourned until to-morrow at 3 p. m.

(Signed) EDM. F. BROWN, *Examiner.*

SATURDAY, 11*th February*, 1865.

Mr. Kennedy, of counsel for petitioner, appeared, and stated that he had no further testimony to offer, and desired that it be closed on the part of the petitioner. The testimony for the petitioner is therefore closed, and the commencement of defendant's testimony is de-

ferred until such time as may be appointed by consent of the respective counsel.

(Signed) EDM. F. BROWN,
Examiner in Chancery.

101 I, Edmund F. Brown, examiner in chancery, do hereby certify that the several depositions contained in the foregoing 55 pages (49 in the original) were taken by consent of the counsel of both the parties to this cause; that the several witnesses were first duly sworn by me to testify the truth, the whole truth, and nothing but the truth; that their depositions were written down by me in their presence, from their statements, and were by me read over to them, and they signed the same in my presence, and that the petitioner and the defendant were both present during the taking of the same.

Given under my hand, at my office, No. 402 F street north, in the city of Washington, this 11th day of February, 1865.

(Signed) EDM. F. BROWN,
Examiner in Chancery.

Examiner's fees.

For per diem attendance, 13 days, at $3	$39 00
For 4 depositions, 49 pages, 11,270 words, at 20 c. per 100	22 50
	61 50

Paid by petitioner.

E. F. B., *Examiner.*

102 WASHINGTON, *Jan'y 16th*, 1865.

SIR: Take notice that in the cause of Joseph C. Willard *vs.* Benjamin Ogle Tayloe, pending in the supreme court of this District, in chancery, witnesses will be orally examined in behalf of the complainant before Edmund F. Brown, esq., an examiner in chancery, at his office, No. 402 F street north, in this city, at the hour of 10 o'clock a. m. on Friday next, the 20th inst., when and where you are at liberty to attend.

KENNEDY & DAVIDGE.

WM. Y. FENDALL, Esq.,
Sol'r for Benj. O. Tayloe.

Service acknowledged Jan'y 16th, 1865.
W. Y. FENDALL, *Sol'r for Def't.*

103 *Exhibit E. F. B., No.* 1.

WASHINGTON CITY, D. C., *April 15th*, 1864.

MY DEAR Mr. TAYLOE: Enclosed please find check $2,000 on Bank of America in New York, am't due (on account purchase

Mansion House property) on May 1st, 1864, together with receipt for same, which please sign and return by bearer. If agreeable to you, I will have the deed and deed of trust prepared between this and the 1st day of May.

Very respectfully, your ob't serv't,

J. C. WILLARD.

(Over.)

Many, very many thanks to you and Mrs. Tayloe for calling on my Mrs. Willard. We hope soon to come and see you. Mrs. W. has now gone to Virginia to visit her parents; will return to-day or to-morrow.

J. C. W.

Exhibit E. F. B., No. 2.

WAS., 15*th April*, 1864.

DEAR SIR: Mrs. Tayloe is waiting for me to go out with her;
104 I have no time now to look into the business, and return the check enclosed; I wish to see you for explanations before closing the matter.

We are sorry not to have had a visit yet from your amiable wife; mine was delighted with her as well as myself.

Yours, truly, in great haste,

BENJ. OGLE TAYLOE.

Exhibit E. F. B., No. 3.

$1,000 annual instalment on furniture; last instalment paid to Feb'y 24th, 1850.

$1,000 that was due Feb'y 24, 1851, with interest to date; and

$1,000 that was due Feb'y 24, 1852, with interest to date; and

$1,000 that was due Feb'y 24, 1853, with interest to date, to be paid, together with the quarterly rent that became due Feb'y 24th, 1853, and lay since accrued to date; as also the taxes on furniture paid by B. O. T., and interest on said payments.

Articles of agreement as written by B. O. T. to W. H. T., and assented to by J. W., "$10,000 to be amply secured by mortgage on valuable property in and about the city, the furniture to be secured in like manner," but subsequently agreed by J. W. and B. O. T. that a lien on the furniture in the hotel, and the assignment of insurance upon it, be made to secure the debt, to be reduced
105 by the pay't of $1,000 annually, with the accrued interest; "$60,000 to be secured by trust."

If I see fit to sell my Mansion House (old hotel) property, the Messrs. Willard are to have the refusal of it at $22,500, I engaging not to sell to any one without an obligation that no hotel is to be built upon the premises within ten years of the date of sale. If Messrs. Willard wish an obligation in writing to this effect it can be made, with a mutual one from them as to the cost on the changes now to be made on the hotel sold to them.

Exhibit E. F. B., No. 4.

WASHINGTON, 23*d April*, 1864.

Major J. C. Willard, Washington.

DEAR SIR: My confidence in you at the time of the signing of the lease, in taking your interpretation of the paper, you assuring me that the sale clause was very unimportant and should go for nothing if I wished it, and that I was at liberty to sell if I could "get a better price," induced me to sign the lease, to which you know I had objected because of your having introduced that sale clause without my knowledge or consent; but as I had signed the paper, I
106 should have carried the matter out if you had proffered me the amount which you know you had offered for the property.

The papers sent me yesterday are herewith returned.

So unwell at this time as to be indisposed to give attention to any business; seeking quiet and repose, and deprecating all kinds of controversy, I hope to avoid every feeling of unkindness; never having wronged or injured you in any way, and certainly not in regard to the Mansion House, I also hope you will see the propriety of having regard to my rights and feelings as well as to my welfare.

Yours, truly,

(Signed) BENJ. OGLE TAYLOE.

Exhibit E. F. B., No. 5.

WILLARDS' HOTEL, *Washington, Dec.* 5, '60.

Mrs. J. W. Tayloe.

DEAR MADAM: Your note at hand this moment; I am sorry you should think my course an unjust one.

I know of none that have befriended me more than the
107 family of which you are an honorable member.

Any acts of mine will not cause me to fear to meet face to face any of the good and very wise men of your relations. I have tried very hard in my lifetime to make you and Mr. Tayloe my permanent friends. The coins I shall not receive.

Respectfully yours,

J. C. WILLARD.

Exhibit E. F. B., No. 6.

Received, Washington city, D. C., January 6th, 1863, from J. C. Willard, three hundred dollars, in full for one quarter rent of Mansion House property, to February 1st, 1863.

$300. BENJ. OGLE TAYLOE.

Exhibit E. F. B., No. 7.

Received, Washington city, D. C., April 11th, 1863, from J. C. Willard, three hundred dollars, in full for one quarter rent of Mansion House, to May 1st, 1863.

$300. P. W. T.,
For BENJ. OGLE TAYLOE.

108 *Exhibit E. F. B., No.* 8.

Received, Washington city, D. C., Nov. 1st, 1863, from J. C. Willard, three hundred dollars, in full for one quarter rent, to date, of Mansion House property, which is in full of all demands of any nature whatever to this date.

$300. BENJ. OGLE TAYLOE.

Exhibit E. F. B., No. 9.

Received, Washington city, D. C., July 10th, 1863, from J. C. Willard, three hundred dollars, in full for one quarter rent of Mansion House property, to the 1st of August, 1863.

$300. BENJ. OGLE TAYLOE.

Exhibit E. F. B., No. 10.

Received, Washington city, D. C., January 12th, 1864, from J. C. Willard, three hundred dollars, in full for one quarter rent, to Feb'y 1st, 1864, of Mansion House property, which is in full of all demands of any nature whatever, to said date of Feb'y 1st, 1864.

$300. BENJ. OGLE TAYLOE.

Exhibit E. F. B., No. 11.

Received, Washington city, D. C., April 16, '64, from J. C. Willard, three hundred dollars, in full for one quarter rent to May 1st, 1864, of Mansion House property.

$300. BENJ. OGLE TAYLOE.

109 *Exhibit E. F. B., No.* 12.

WAS., 12*th Oct.*, 1860.

DEAR SIR: Am I to understand from your correspondence with Mrs. Tayloe that you claim the exclusive privilege of purchasing the Mansion House property for the period of ten years? You must know, I think, that I did not so understand it when I put my name to that lease; and you must also remember my astonishment at finding a verbal arrangement incorporated in the lease, and my objecting to sign the paper in consequence; which I certainly should not have done but for your explanation to Mrs. Tayloe, at the time of the signing, that I was at liberty to sell, and your assurance to me that, in its present form, it amounted to no more than our previous conversation, which surely never contemplated your present position, as I fear I must understand it. I took your word and trusted you as I have always done, entirely.

If the lease binds me to keep the property ten years on the uncertainty of your will, I was most grievously deceived.

If my present arrangement is interfered with, it is not un-
110 likely, from present political appearances, that it will be my interest to sell the property to you for $22,500. But can I

compel you to take it, even after you have prevented my doing better? You see the absurdity of my making such an arrangement, which I never, knowingly, did.

Please let me hear from you in reply.

Yours, &c.,

BENJ. OGLE TAYLOE.

Mr. J. C. WILLARD, *Willards' Hotel*.

[Copy.—Written on same paper as above.]

WILLARDS' HOTEL, *Washington, Oct. 12th*, '60.

Benj. Ogle Tayloe, esq.

DEAR SIR: The lease will be my guide.

Yours respectfully,

J. C. W.

Exhibit E. F. B., No. 13.

WILLARDS' HOTEL, *Washington, Oct.* 2, '60.

DEAR Mr. TAYLOE: In reply to your note of this morning, you have a copy of our agreement in regard to the Mansion House, which you will please be governed by.

Very resp'y, y'r friend,

J. C. WILLARD.

(Reply to next following.)

111 2D OCT., 1860.

MY DEAR Mr. WILLARD: Yesterday I returned from the north. While there I had an offer for the old Mansion House Hotel much beyond yours, and have accepted it.

This, I understood, was our agreement, that if I could sell it for more, I was at liberty to do so.

Yours truly,

BENJ. OGLE TAYLOE.

Mr. JOS. C. WILLARD,
Willards' Hotel, Washington.

Exhibit E. F. B., No. 14.

WAS., 3*d Oct.*, 1860.

DEAR SIR: Thanks for your payment to-day to Mrs. Tayloe.

I am much occupied just now, and cannot refer to the paper you allude to, which is in the bank in my box.

I am now going to Mr. Claggett's funeral as pall bearer, and to-morrow expect Mr. Rives and other gentlemen to stay with me, for, perhaps, two or three coming days, during which time I shall be unable to attend to business.

112 I do not remember the words of the paper, but feel quite sure the understanding was that if I could do better in a sale I was at liberty to do so.

Mrs. Tayloe has twice asked me in eighteen months to look at that paper, saying she did not believe you understood it as we did.

The carriage is at the door and I write in haste, which must be my explanation for such a scrawl.

Yours truly,

BENJ. OGLE TAYLOE.

Exhibit E. F. B., No. 15.

WAS., 23*d April*, 1864.

Major Jos. C. Willard, Washington.

DEAR SIR: My confidence in you at the time of signing the lease, in taking your interpretation of the paper, you assuring me the sale clause was very unimportant, and should go for nothing if I wished it, and that I was at liberty to sell if I could get a better price, induced me to sign the lease, to which you know I had objected, and because of your having introduced that sale clause without my knowledge or consent. But as I had signed the paper, I should
113 have carried the matter out if you had proffered me the amount which you know you had offered for the property.

The papers sent me yesterday are herewith returned.

So unwell, at this time, as to be indisposed to give attention to any business; seeking quiet and repose, and deprecating all kinds of controversy, I hope to avoid every feeling of unkindness, never having wronged or injured you in any way, and certainly not in regard to the Mansion House. I also hope you will perceive the propriety of having respect to my rights and feelings, as well as to my welfare.

Yours truly,

BENJ. OGLE TAYLOE.

Exhibit E. F. B., No. 16.

To Mr. Willard.

DEAR SIR: I wanted much to see you, but know you are very busy. Do you know a "lady's note" is a very delicate thing? I have never given *one but to you*. You know the estimation in which I have always held you, and how unwilling I am to censure you. The note you hold is the outward sign of a pure charity, a sort of
114 sacred deposit, and you so understood it—a thing all apart from your regular business. You told me to let it give me no concern, that it was a pleasure for you to have it, and that it could be paid when it suited my pleasure or convenience. No *man* would have given you the note under the circumstances. *You* had spent that money; I would not have done so. It was *impossible;* but as you had so wearied of the business, and I had been the means of introducing Mr. Groux to you, and you had been very kind, (may it be accounted to you for righteousness,) I gave you my note, but most reluctantly, never doubting an instant that you would treat it with all the delicacy my brother would. Imagine my mortification when I heard you had not only offered my note to my husband, but to a

stranger. I wept bitterly. And who was it that had thus humbled me? not an enemy, for I have not one, but a person whom those I loved well delighted to promote, one whom I have *persisted* in liking, and in believing generous and just. His personal merits are certainly great; but to whom does he owe, under Providence, the position that has made his great fortune? I do wish you to do
115 always the thing that is just and right, and am pained to doubt you. I know that wise and good men had great confidence in you, and those men you will yet meet face to face.

Ever your well wisher,

P. W. TAYLOE.

The coins are at your service; they have been both a trouble and mortification to me; my interest in them I will readily trust with you without note or security of any sort.

Thursday.

Exhibit E. F. B., No. 17.

WILLARDS' HOTEL, WASHINGTON, D. C., *Dec.* 5, '60.

Mrs. J. W. Tayloe.

DEAR MADAM: Your note at hand this moment; I am sorry you should think my course an unjust one.

I know of none that have befriended me more than the family of which you are an honorable member.

Any acts of mine will not cause me to fear to meet face to face any of the good and very wise men of your relations. I have tried
116 very hard in my lifetime to make you and Mr. Tayloe my permanent friends.

The coins I shall not receive.

Respectfully, yours,

J. C. WILLARD.

Exhibit E. F. B., No. 18—

Is a black-bordered envelope addressed to "Mr. Joseph C. Willard, Willards' Hotel," in the handwriting of exhibit No. 16?

Exhibit E. F. B., No. 19.

Received, Washington, Dec. 14th, 1854, of Joseph C. Willard, one hundred and seventy-five dollars, in full, of three months' rent of Mansion House, from Aug. 1st to Nov. 1st, 1854.

BENJ. OGLE TAYLOE.

Was., 13th Dec'r, 1854.

Exhibit E. F. B., No. 20.

WAS. 14*th Aug.*, 1856.

Mr. Jos. C. Willard.

DEAR SIR: I thank you for the payment you made to Mrs. Tayloe—$175, rent of the old hotel to 1st inst—during my absence.

I returned home to-day, and wish to send Thornton to Capon
117 to-morrow morning, but I can't furnish him the money he needs, the bank being closed. Can you do me the favor to furnish it? I refer you to him.

I wish to see you to-morrow morning, and will try to do so; I have in my eye something for your benefit, but you may differ with me.

Y'rs truly,

BENJ. OGLE TAYLOE.

Exhibit E. F. B., No. 21.

Received of Jos. C. Willard for rent of Mansion House (old City Hotel), to 1st Feb'y, 1856, one hundred and seventy-five dollars.

BENJ. OGLE TAYLOE.

3d March, 1856.

Exhibit E. F. B., No. 22.

MAY 17, 1856.

Received of Jos. C. Willard one hundred and seventy-five, on account of Mansion Hotel, to 1st May.

BENJ. OGLE TAYLOE.

Exhibit E. F. B., No. 23.

Received, Washington, Nov. 1, 1856, from J. C. Willard, one hundred and seventy-five dollars, in full for rent of Mansion House to date. ($175.)

BENJ. OGLE TAYLOE.

118 *Exhibit E. F. B., No.* 24.

Received, Washington, January 1st, 1857, from J. C. Willard, one hundred and seventy-five dollars, in full for rent of Mansion House, one quarter, to date of February 1st, 1857.

BENJ. OGLE TAYLOE.

Exhibit E. F. B., No. 25.

Received, Washington, May 4, 1857, from J. C. Willard, one hundred and seventy-five dollars, in full for rent of Mansion House to May 1st, 1857, one quarter.

$175. BENJ. OGLE TAYLOE.

Exhibit E. F. B., 26.

Dr. $175. WASHINGTON, *Aug. 8th*, 1857.

Received of J. C. and H. A. Willard one hundred and seventy-five dollars, in full for rent of Mansion House to date of August 1st, 1857.

BENJ. OGLE TAYLOE.

Exhibit E. F. B., No. 27.

Dr. 300. WASHINGTON, *November* 1*st*, 1859.

Received of J. C. Willard the sum of three hundred dollars for one quarter's rent of Mansion House, which is in full of all demands to date.

P. W. TAYLOE,
For B. O. T.

119 *Exhibit E. F. B., No.* 28.

Dr. $300. WASHINGTON, *February* 1*st*, 1860.

Received of J. C. Willard the sum of three hundred dollars for one quarter's rent of Mansion House, which is in full of all demands to date.

E. T. TAYLOE,
For BENJ. OGLE TAYLOE.

Feb'y 6th, '60.

Exhibit E. F. B., No. 29.

Received, Washington, April 24, 1860, from J. C. Willard three hundred dollars, in full for one quarter's rent of Mansion House to date of May 1st, 1860.

$300. BENJ. OGLE TAYLOE.

Exhibit E. F. B., No. 30.

Received of J. C. Willard three hundred dollars, in full for one quarter's rent of Mansion House to August 1st, 1860.

Dr. $300. P. W. T.
For BENJ. OGLE TAYLOE.

Exhibit E. F. B., No. 31.

Received, Washington, Oct. 3, 1860, from J. C. Willard three hundred dollars, in full for one quarter's rent Mansion House to Nov. 1st, 1860.

$300. P. W. TAYLOE.

120 *Exhibit E. F. B., No.* 32.

Received, Washington, February 1st, 1861, from J. C. Willard three hundred dollars, in full for rent of Mansion House, one quarter, to date.

$300. P. W. T.,
For BENT. OGLE TAYLOE.

Exhibit E. F. B., No. 33.

Received, Washington, April 3d, 1861, from J. C. Willard three hundred dollars, in full for one quarter's rent of Mansion House, as per lease, to May 1st, 1861.

$300. P. W. T.,
For BENJ. OGLE TAYLOE.

Exhibit E. F. B., No. 34.

Received, Washington, July 31st, 1861, of J. C. Willard three hundred dollars, for one quarter's rent, to date, inclusive, which is in full of all demands to this date.

Dr. $300. BENJ. OGLE TAYLOE.

Exhibit E. F. B., No. 35.

Received, Washington, Sept. 28th, 1861, from J. C. and H. A. Willard three hundred dollars, in full for one quarter's rent, to November 1st, of Mansion House, which is in full of all demands of any nature whatever to date.

$300. B. O. T.,
By P. W. TAYLOE.

121 *Exhibit E. F. B., No.* 36.

WASHINGTON, D. C., *May 1st*, 1862.

Received of J. C. & H. A. Willard the sum of three hundred dollars, being the amount of one quarter's rent of Mansion House to date.

P. W. T.,
For BENJ. OGLE TAYLOE.

Exhibit E. F. B., No. 37.

Received, Washington, November 20th, 1862, from J. C. & H. A. Willard six hundred dollars, in full for six months' rent of Mansion House, from May 1st to November 1st, 1862.

$600 BENJ. OGLE TAYLOE.

Exhibit E. F. B., No. 38.

Received, Washington, December 23d, 1861, from J. C. & H. A. Willard three hundred dollars, in full for one quarter rent, to February 1st, 1862, of Mansion House, which is in full of all demands of any nature whatever to date.

$300 P. W. T.,
For BENJ. OGLE TAYLOE.

Exhibit E. F. B., No. 39.

MY DEAR Mr. WILLARD: Mr. Tayloe wishes me to write
122 you my recollections of his signing the lease of the M. H. I went down stairs to see you, not knowing of any business; when told of your idea of purchasing, (which was quite new to me,) I said, say $25,000, at which you shook your head; I then said why not buy it now, Mr. Willard? On you saying you could not, I remarked "You don't expect my husband to be bound to keep this property ten years, and you take it or not, just as you please;" your answer was, in your jubilant way, "If he can find anybody to give him more, they can have it." Of what use is the paper then? said I. "Oh, I want it," was your response.

The after conversation left the idea on my mind that the agreement amounted only to your having the preference; if Mr. T. wished to sell, that he was at liberty, as you, to be on or off. You know I was brought up in too good a school to let my husband bind himself without some corresponding obligation.

The truth is Mr. Tayloe signed the lease without in the least considering that part, just because you wished it.

The lease was not read to me then, and I have not since seen it, but trust all will come right.

With every good wish, yours, &c.,

P. W. TAYLOE.

Tuesday 9th, President's Square.

123 [Copy.]

Exhibit E. F. B., No. 39.

Mrs. P. W. Tayloe :

In reply to your note of this date, you will, I am sure, allow me to express my surprise at the impression you have of what passed between Mr. Tayloe and myself in regard to the sale of the Mansion House Hotel. You may be quite right in your recollection that the sum of twenty-five thousand was named in your presence, and that I said if any one would give more for it, they could have it. But all this preceded the actual contract between Mr. Tayloe and myself. That contract looks especially to my making great alterations in the premises during my term, and I have in fact made such. Certainly if I had supposed Mr. Tayloe, at the time he executed the lease, thought for a moment that during or at the expiration of the term he would have the right to sell the property at an increased price by reason of these improvements, I would have taken care to have guarded myself against it. And you will see by the lease no such thing is done, nor did I ever for an instant suppose Mr. Tayloe thought he had any such right. I cannot but regret, very deeply regret, that this impression is on your mind, but assuredly I never would have made such an agreement as you suppose, and I
124 have no recollection of anything from which it could be inferred that I intended to do so.

For your better satisfaction I enclose you a copy of the lease, a portion of which I have marked for your particular notice.

Oct. 9, '60.

An envelope addressed "Mr. Joseph C. Willard, Willards' Hotel." (Same hand as Exhibit 39 and 40.)

Exhibit E. F. B., No. 40.

DEAR MR. WILLARD. Thank you for your note just received. I have not seen Mr. Tayloe since 10 o'c. You certainly did not purchase the property at the signing of the lease. You have not purchased it now—6 years—and you have expended but triflingly on the premises, such as has been returned to you by your increased rents.

Mr. Tayloe has made arrangement to sell the property for a much larger sum than you *prospectively* and *contingently* offered, as he thought he had a perfect right to do. But you shall in no way be wronged; your lease shall not be interfered with, only you cannot have
125 the property, if you should desire it. No one shall. The law makes me a party, and I was deceived by your own words. It is fortunate that we have had this explanation before you have made a larger outlay on the premises. If you feel wronged, I will venture to say you may throw up your lease. I know nothing that passed between you and Mr. Tayloe; I only know what passed between you and me in his presence and that of one of our boys.

Yours in haste, very truly,

P. W. TAYLOE.

I will return the lease this evening.

Tuesday, 3½ .

[Copy.]

WILLARDS' HOTEL, *Washington, Oct* 9,'60.

DEAR MRS. TAYLOE: Your kind note of this p. m. just received. In reply I assure you that I shall be governed by the terms of the lease, copy of which you have received. Y'rs truly, J. C. W.

(This written on same piece of paper as above.)

(The above indorsed by the following:)

126 I have examined the lease and agreement between Mr. Tayloe and Mr. Willard, referred to in this letter, for the Mansion House Hotel property, and considered the facts mentioned in the correspondence with Mrs. Tayloe, and have not a shadow of doubt that his right to purchase, as stated in the agreement with the lease, is valid, and beyond every exception or dispute.

JOS. H. BRADLEY.

11 Oct., 1860.

127 To the honorable the supreme court of the district of Columbia, sitting in equity:

The petition and bill of complaint of Henry A. Willard against Benjamin O. Tayloe, showeth:

That there is now pending in this honorable court a certain suit in equity, wherein Joseph C. Willard is complainant, and the said Benjamin O. Tayloe is defendant, being case No. 207 on the equity side of said court, wherein the said Benjamin O. Tayloe hath filed his answer, and the parties are now taking proof, and the said cause is at issue.

That the object of the said bill is to obtain a decree of this court to compel the said Benjamin O. Tayloe to execute specifically a certain agreement in writing set out and exhibited with the said bill,

relating to the sale of certain real estate in the city of Washington, by said Benjamin O. Tayloe, all which will more fully and at large appear by reference to the bill, answer, and proceedings in said cause on file and of record in this court, to all which he refers for greater certainty.

And your petitioner prays leave to be let in as complainant in said cause, because he says he was and is equally interested therein with the said Joseph C. Willard.

128 And he shows unto your honors that at the time the said lease was made by said B. Ogle Tayloe, and agreement for the sale of the said premises to the said Joseph C. Willard, your orator and the said Joseph C. Willard were as partners engaged in the business of hotel keeping, and keeping "Willards' Hotel," on premises adjacent to those mentioned in said bill; that your orator had started the said business, and afterwards admitted the said Joseph C. into copartnership with him on equal shares and interests.

That when the said Joseph C. took the said lease and agreement of sale from said Tayloe, your orator did not ask him in whose name the same was taken; but the said leasehold property was taken possession of and carried on, the rents, taxes, insurance, repairs, &c., and the receipts therefor were brought into joint account between his said brother Joseph C. and himself; the tenements thereon were repaired, and at one time added to and formed part of "Willards' Hotel;" and so the said account was ever kept so long as any was rendered or settled between the said Joseph C. and your orator.

Your orator and the said Joseph C. sold out their hotel bu-

129 siness and furniture, and leased the hotel buildings in the year , and thereafter the said Joseph C. had the principal, if not almost the entire, management of the said Mansion House property.

On the 27 August, (1861,) eighteen hundred and sixty-one, the said Joseph C., in consideration of the premises, and for the expressed consideration of ten dollars paid to him by your orator, conveyed to your orator one equal undivided moiety or half part of and in said piece or parcel in the said lease from said Tayloe to said Joseph C. Willard particularly described, together with one equal undivided moiety or half part of the said lease *of the said lease* of the said premises, for the residue of the said term of ten years therein mentioned, and also all the advantages, rights, and interests in the agreement of purchase and covenants on the part of the lessor therein contained, so that the said Henry A. Willard, his executors, administrators, and assigns, shall and may be henceforth equal copartners therein with the said Joseph C. Willard, his executors, administrators, and assigns, he and they paying one-half the rent reserved in and by said indenture, and equally keeping and performing the covenants on the part of the said lessee therein and thereby contained and set out and to be performed by said lessee, all which

130 will more fully and at large appear by reference to the said deed. A true copy thereof is herewith filed, is part of this bill, marked Ex. A., H. A. W.

Copy Ex. A.

JOSEPH C. WILLARD
to
HENRY A. WILLARD.
} Deed recorded 30 August, 1861.

This indenture, made this twenty-seven day of August, in the year eighteen hundred and sixty-one, between Joseph C. Willard of the first part, and Henry A. Willard of the second part, both of Washington city, and District of Columbia. Whereas heretofore, to wit, on the twelfth day of April, in the year eighteen hundred and fifty-four, Benjamin O. Tayloe, by his certain indenture of lease, granted, leased, and to farm let to the said Joseph C. Willard, his executors or assigns, all that lot or parcel of land situate and being in the city of Washington aforesaid, and fronting, between 14th and 15th streets, on Pennsylvania avenue about one hundred feet, by about the same number of feet in depth to an alley, being the same property then occupied by Daniel Rowland, and known as the Mansion House, to have and to hold the same unto the said Joseph C. Willard,
131 his executors or assigns, for and during the full term of ten years, commencing with the first of May thence next ensuing, yielding and paying therefor unto the said Benjamin O. Tayloe, his heirs or assigns, the just and full annual rent of twelve hundred dollars, in equal quarterly payments as in and by the said in part recited indenture of lease, recorded in liber J. A. S., No. 80, folios 163, 164, and 165, one of the land records for Washington county, in the District of Columbia, reference to which thereunto had will more fully appear, and also containing certain covenants and privileges relating to the erection and building of any houses, tenements, or other structures as said lessee might think proper upon said premises during said lease, and also the right or option to purchase the said premises at any time before the expiration of said lease, upon the terms therein stipulated and set forth, reference to which lease, for greater certainty and as part of these presents, is hereby made:

Now this indenture witnesseth, that the said Joseph C. Willard, for and in consideration of the sum of ten dollars current money of the United States to him in hand paid by the said Henry A. Willard, at and before the sealing and delivery of these presents, the re-
132 ceipt whereof he doth hereby acknowledge, hath granted, bargained, and sold, assigned, transferred, and set over, and by these presents doth grant, bargain, and sell, assign, transfer, and set over, to the said Henry A. Willard, his executors, administrators, and assigns, one equal undivided moiety or half-part of and in the said piece or parcel of ground in the said hereinbefore in part recited indenture of demise particularly described, together with the equal undivided moiety or half-part of the said lease of the said premises, for the residue of the said term of ten years therein mentioned, and also all the advantages, rights, and interests in the agreement of purchase and covenants on the part of the lessor therein contained, so

that the said Henry A. Willard, his executors, administrators, and assigns, shall and may be henceforth equal copartners therein with the said Joseph C. Willard, his executors, adminitrators, and assigns, he and they paying one-half the rent reserved in and by said indenture, and equally keeping and performing the covenants on the part of the said lessee therein and thereby contained and set out and to be performed by said lessee, to have and to hold the
133 said undivided moiety or half part of all and singular the premises to, unto, and to the use of the said Henry A. Willard, his executors, administrators, and assigns.

In testimony whereof, the said parties of the first and second parts have hereunto set their respective hands and seals, the day and year first above written.

J. C. WILLARD. [SEAL.]
H. A. WILLARD. [SEAL.]

Signed, sealed, and delivered in the presence of—
N. CALLAN.
O. E. P. HAZARD.

DISTRICT OF COLUMBIA, *Washington county, sct:*

We, N. Callan and O. E. P. Hazard, justices of the peace in and for the county aforesaid, in the District aforesaid, do hereby certify that before us, in our said county, personally appeared Joseph C. Willard and Henry A. Willard, parties to a certain indenture of lease hereto annexed, bearing date the day of 27th , A. D. 1861, they being personally well known to us to be the persons who executed the said indenture, and each for himself acknowledged the same to be his act and deed. Given under our hands and seals this 27th day of August, in the year eighteen hundred and sixty-one.

N. CALLAN. [SEAL.]
O. E. P. HAZARD. [SEAL.]

134 I, Nathaniel C. Towle, register of deeds for the county of Washington and District of Columbia, do hereby certify that the foregoing and annexed is a true copy of a "deed" from Joseph C. Willard to Henry A. Willard, as recoded in liber J. A. S., No. 212, folios 431, 432, and 433, one of the land records of said county and District.

Given under my hand and official seal, this tenth day of June, A. D. 1864.

N. C. TOWLE, *Register.*

Your orator further shows that on the 14th April, 1864, he sent a letter to the said Joseph C. Willard relating in part to other matters of business and in part to this purchase from said B. O. Tayloe, and said to him therein, "The time of payment to Mr. Benj. O. Tayloe for the purchase-money of the Mansion House property is fast approaching, and I desire to put in your hands my portion of the amount to be paid in full time before it is due. I therefore write to in-

quire when I shall deposit it to your credit, as I prefer it should take that course, you having alone heretofore conferred with Mr. Tayloe. Please let me know at your earliest convenience." To this your ora-
135 tor did not receive any reply, and he became apprehensive that either by reason of the absence of said Joseph C. Willard, or from some other cause, he had not received it. He is now satisfied, and charges the fact to be so, that the said letter was duly received by said Joseph C. Willard.

And your orator further shows that he always was under the impression that the sum to be paid to the said Tayloe for the purchase-money of his title to and interest in the said premises named in said lease and agreement, was twenty thousand dollars; and being under that impression, and fully to comply on his part with the obligation on the part of the purchasers under said agreement, and to put in the hands of the said Joseph C. one-half of said purchase, he did, on the 26th day of April, 1864, send to his said brother, Joseph C., his check on the Bank of Commerce of New York for $10,000, which check has never been returned by said Joseph C. to him, and the money therefor then was, and ever since hath been, in the said bank ready to meet the same, and he files herewith as part of this bill a true copy of said check, marked Ex. B, H. A. W.

Copy of a check.

Bank of Commerce, New York: Please pay to the order of J. C. Willard, esq., the sum of ten thousand dollars, being my por-
136 tion of the payment for the property known as the Mansion House, in Washington, D. C., as per deed dated Aug. 27th, 1861.

H. A. WILLARD.

April 26, 1864.

Your orator subsequently obtained a copy of said lease and agreement, and finds on examining the same "that the said Joseph C. Willard, his executors or assigns, shall have the right or option to purchase the above-described lot or piece of ground, together with all the buildings and improvements thereon, at any time before the expiration of the lease aforesaid, on paying or securing to be paid for the same the sum of twenty-*two* thousand five hundred dollars, payable as follows: two thousand thereof in cash, and two thousand, together with the interest on all the deferred payments, in each and every year thereafter till the whole is paid, the deferred payments to be secured by a deed of trust on the property, and a good warranty deed is to be given to the said Willard, his heirs or assigns, except only as to the yearly ground-rent of three hundred and ninety dollars now existing against the said property, and subject to which said deed is to be made."

137 And your orator says that if he had known these facts he would have tendered, as in said letter he proposed, his portion of the amount to be paid according to the terms of said agreement, and he here tenders himself ready and willing to do so, either

to said Joseph C. Willard or said Benjamin O. Tayloe, to pay and secure to be paid the one-half of the said purchase-money according to the terms of the said agreement of sale, or at once to pay the whole amount of one-half of said purchase money, as may be required by the decree of this court.

He further shows that he is advised it is material, competent, and proper for him to be made a party complainant in this pending suit; that by the terms of the said agreement of sale, and by the deed aforesaid to him, he is as assignee of said Joseph C. Willard, substituted in equity in the place of the said Joseph C. Willard, and entitled to a specific execution of the said contract, by reason whereof the said Benjamin Ogle Tayloe is bound and obliged to convey the said property to the said Joseph C. Willard and to your orator as tenants in common; and to avoid circuity of action and multiplicity of suits he has a right to come in and claim the benefit of the execution of the said contract.

138 He is advised that this court has exclusive jurisdiction in such cases, and that he can have no relief elsewhere. Wherefore he prays that he may be made party complainant with the said Joseph C. Willard in the said action, he paying one equal half part of the costs and fees to which said Joseph may be put, and that in the decree prayed for by the said bill so as aforesaid filed by said Joseph C., your orator may be taken and declared to be equally interested with said Joseph C., and that the conveyance therein asked for may be made to your orator and said Joseph C. as tenants in common, they paying their equal portion or half part of said cash purchase, and assuming and securing, either jointly or severally as the case may be, the deferred payments, and securing the same as is provided in and by said agreement; that the said Benjamin O. Tayloe may be made party-defendant hereto and answer this bill, and that process may issue accordingly; and your orator, &c.

H. A. WILLARD.

BRADLEY, *for H. A. Willard.*

DISTRICT OF COLUMBIA, *Washington county, to wit:*

Henry A. Willard, whose name is signed to the foregoing petition and bill in equity, makes oath according to law before me, this 6th day of March, 1865, that the facts stated therein, as of his own knowledge, are true, and believes those to be true which are therein stated on the information of others.

R. J. MEIGS, *Cl'k.*

139 In the supreme court of the District of Columbia.—In chancery, No. 207; equity docket, 7.

JOSEPH C. WILLARD
vs.
BENJAMIN OGLE TAYLOE.

Testimony for defendant.—Filed March 27, 1865.

I, Edmund F. Brown, an examiner duly appointed by said court, do hereby certify that in the months of January and February, 1865,

I examined certain witnesses in behalf of the complainant in the above cause, and returned the depositions to the clerk of said court; and that on the 20th day of March, 1865, in pursuance of notice on the 16th, and by consent of the respective counsel, I proceeded to take testimony in behalf of the defendant.

Walter S. Cox, esq., appeared as counsel for the defendant, and John C. Kennedy, esq., and Walter D. Davidge, esq., as counsel for the complainant, and the examination proceed as follows:

140 Benjamin Ogle Tayloe, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by Walter S. Cox, esq., counsel for the defendant, as follows:

1st interrogatory. Did the complainant ever make a tender to you in money in part payment for the Mansion House property?

(Objected to by Mr. Davidge as leading, and because it relates to what is a matter of law.)

Answer. He did not.

2d int. Did he say to you, on the occasion of his visit to you on the 16th of April last, that he had come to pay or to tender you money for said object?

(Objected to as leading.)

Answer. He did not.

3d int. Did Mr. Ward, on or after the 16th of April, tender you any money on account of Mr. Willard?

(Objected to as leading.)

Answer. He did not.

4th int. Did Mr. Ward, at any such time, exhibit to you two bank bills of one thousand dollars each?

(Objected to for same reason.)

Answer. He did not.

5th int. Did you ever see Mr. Ward again, or Mr. Willard, or hear of either of them calling or sending to your house after your
141 one interview with Mr. Ward?

(Objected to as above.)

Answer. I did see Mr. Ward once at the door of my house, but never saw him nor Mr. Willard on this business afterwards.

6th int. Did you leave Washington after said interview with Ward? and if so, how soon after, and for what reason?

(Objected to.)

Answer. I left Washington after said interview with Ward, about a week after; I left on account of the illness of my son, having received a letter stating that he was seriously ill at the north, and my presence was required. I left Washington on the morning of the 25th of April, and returned about the middle of May, 1864. My son was in Connecticut, near Hartford.

7th int. Did you refuse to receive legal-tender notes in part payment for the Mansion House property, as testified by the complainant?

(Objected to as leading.)

Answer. I did not.

8th int. At the time of the execution of the lease by you to the complainant, was the covenant of sale therein contained objected to by you, and what conversation was had with the complainant in regard to it?

(Objected to as leading, and because seeking by parol proof
142 to contradict or vary the plain import of a written instrument.)

Answer. It was objected to by me, on the ground that it was wholly unauthorized to be inserted in that lease, and that I could not assent to it. He inquired if the residue of the lease was right. On my admitting it was, he said it would save him the trouble of having another lease drawn, and that this clause should go for nothing if I wished it; but that he had "a special reason" why he wished it to remain. Before signing the paper, my wife came in, and the complainant said to her "the clause should go for nothing," and "that if Mr. Tayloe could find a greater fool than I am, he shall be at liberty to sell the property whenever he chooses." I quote his words.

9th int. Was or was not the complainant frequently at your house during the winter of 1863–'4, and up to the middle of April last?

(Objected to as leading and irrelevant.)

Answer. He was, up to the time of his marriage, which occurred about a year ago.

Int. 10. Had he ever spoken to you on the subject of purchasing the Mansion House before the 16th of April last?

(Objected to as leading.)

Answer. He never had.

143 Cross-examination, by the counsel for the complainant:

1st x-int. Did you, before leaving this city on the 25th of April last, know that the complainant claimed the performance of the covenant of sale contained in the lease of the Mansion House property?

Answer. I did.

2d x-int. Did you know that he intended to make the cash payment of the purchase-money under the covenant, and demand a conveyance of the property?

Answer. I did not.

3d x-int. Did you receive the note offered in evidence, dated the 15th of April last, and enclosing a check on the Bank of America for $2,000?

Answer. I did not.

4th x-int. You have stated that you had an interview with Mr. Ward. Did he state the object of his visit to you?

Answer. He did not.

5th x-int. What passed between you and Mr. Ward?

Answer. He said, slowly, he came with a message from Mr. Willard.

I replied I required explanations of Mr. Willard, and should
144 write him. Mr. Ward did not say a word more, unless it was to say, good morning; and I do not know that he said that. He called between the 16th and the 23d of April.

6th x-int. Explanations about what?

Answer. The carrying out of the lease.

7th x-int. Then you knew the object of the visit of Mr. Ward?

Answer. I inferred it.

8th x-int. Is the letter offered in evidence by the complainant, in response to his letter to you enclosing the check, in your handwriting?

Answer. It is.

9th x-int. Is the letter of the 23d of April, purporting to be written by you, in your handwriting, and is it in further response to his letter of the 16th of April?

Answer. It is in my handwriting, and was not in response to his letter of the 16th April.

10th x-int. In the month of April last, did you write to Mr. Willard more than once to inform him that you desired explanations before executing a deed for the Mansion House property?

Answer. I recollect only the two notes on file as evidence in this cause.

11th x-int. Did you have an interview with the complainant on the 15th of April last, in relation to the performance by you of
145 the covenant of sale contained in the lease?

Answer. I did not.

12th x-int. Did you have any interview with him on that day? If so, on what subject?

Answer. I had no interview with him on that day.

13th x-int. Had you, on the 16th or 17th of April last, an interview with the complainant in relation to the performance of the covenant of sale?

Answer. On the 17th I had.

14th x-int. You have stated that you did not receive the letter of the complainant dated the 15th of April, enclosing the check on the Bank of America, and also that the answer to that letter, returning the check, was written by you; will you explain what you mean?

Answer. I meant to say, though I received the note with the check enclosed, I did not accept the check, it not being a legal tender. I did not intend to say that I did not actually receive the note and the check.

15th x int. You have stated that you received the note and check enclosed, and returned the check, and that subsequently you had the interview with Mr. Willard and Mr. Ward, in relation to the execution of the covenant in the lease. Do you mean to say that you did not know that the complainant intended to pay the money re-
146 quired by the covenant, and demand the property?

Answer. I don't know that I had any interview with Mr. Ward in relation to the covenant in the lease; I do mean to say that I did not know the complainant intended to pay the money and demand the property.

16th x-int. What did you suppose he intended?

Answer. I supposed he intended to swindle me.

17th x int. How?

Answer. By putting a paper upon me under false pretences, sent

as a deed of trust according to the covenant of the lease, which it was not.

18th x-int. From whom did you receive that deed of trust?

Answer. From my servant who received it at the door.

19th x-int. When did you receive it?

Answer. After my interview with Mr. Ward, and preceding my letter of the 23d of April, when it was returned to the complainant.

20th x-int. What did you suppose the check was for, unless to make the cash payment called for by the covenant?

Answer. I supposed it was intended to be put upon me as a payment.

147 20th x-int. Did a deed accompany the deed of trust of which you have spoken?

Answer. It did.

21st x-int. Is the deed sent you with the deed of trust the same that is filed in this cause as an exhibit?

Answer. It is.

22d x-int. Did you ever mention to the complainant your objection to the deed of trust? Or did you take any steps to apprise him of it?

Answer. I apprised him of my objection by the returning the deed of trust, not doubting that he knew the objection.

23d x-int. Did you apprise him of your objection to the deed of trust in any other way?

Answer. In no other way; I deemed it unnecessary.

24th x-int. Had the deed of trust been unobjectionable and according to the covenant, would you have executed a deed of conveyance of the property?

(Objected to by Mr. Cox as irrelevant.)

Answer. I should have done so, if the contract on the part of the complainant had been fulfilled according to the understanding of the agreement.

25th x-int. To what understanding do you refer?

148 Answer. I required a deed of trust for the whole property as I had proposed to sell it; I required a performance of the contract, which required the equivalent of gold, being sold when gold was the legal tender?

26th x-int. Do you mean to say that it was your intention to make the conveyance only upon the complainant's making the cash payment in gold or its equivalent, and securing the deferred payments payable in like manner?

Answer. I conceived my contract gave me the right to claim in legal-tender notes, the then equivalent for gold, as the price of my sale of my property.

27th x-int. Did you ever so state to the complainant? and if so, when?

Answer. I did so, in the only interview I had with him on the subject, the 17th of April.

28th x-int. Had the cash payment required by the covenant been

the deferred payments been secured to be paid in like manner, was it your intention to make the conveyance?

Answer. It was not.

March 20, 1865. At 10 p. m. adjourned to Thursday next, at 10 a. m.

(Signed) EDM. F. BROWN, *Examiner.*

149 THURSDAY, 23*d March*, 1865.

Met pursuant to adjournment.

Mr. Cox, counsel for defendant, offered in evidence the affidavit of Mr. Redin, which was taken by me this morning before the arrival of the respective counsel.

The same having been examined by Mr. Kennedy, counsel for the complainant, and not objected to, it is hereunto annexed, marked Exhibit A.

Mr. Kennedy offered Exhibit B, which was indorsed by Mr. Cox thus: Admitted in evidence as if handwriting proved, subject to any exceptions to its competency as evidence. Walter S. Cox, for def't.

Mr. Tayloe appeared to sign his deposition, neither party having any further questions to ask.

(Signed) BENJ. OGLE TAYLOE.

Sworn to and subscribed before me this 23d day of March, 1865.

(Signed) EDM. F. BROWN,
Examiner in Chancery.

[5-cent rev. stamp.]

150 *Exhibit A.—E. F. B., exam'r.*

UNITED STATES OF AMERICA,
District of Columbia, county of Washington, ss:

I, Edmund F. Brown, a notary public in and for the county and District aforesaid, by lawful authority duly commissioned and sworn, authorized by law to take depositions and acknowledgments, do hereby certify that on this twenty-third day of March, in the year of our Lord one thousand eight hundred and sixty-five, before me, in my county aforesaid, personally appeared William Redin, esq., and made oath according to law that in a long experience in regard to the conveyancing of property, and as to the rule between vendor and vendee, he has found the rule to be that the vendee prepares the deeds, namely, the conveyance to himself and the deed of trust, if one be required, at his own cost, in the absence of any special contract between the parties in relation to the expense; and that the vendor bears the cost attending the conveyance from himself.

(Signed) W. REDIN.

Sworn to and subscribed before me this 23d day of March, 1865.

(Signed) EDM. F. BROWN,
Notary Public and Examiner in Chancery.

[5-cent rev. stamp.]

151 *Exhibit B.—E. F. B., exam'r.*

HUDSON, N. Y., *May* 7, 1863.

J. C. Willard, esq.

D'R SIR: If I intended to be in Washington much of my time I would purchase your interest in Oak Lawn. I think it would be a good time to offer it for sale, and if advertised, it might find a purchaser; and if not at private sale, I think at auction. You may dispose of it as you see fit, and at such a price as you can get for it, and I will be satisfied. The other property, square 578, Evans & Johnson House, sell at auction. I will acquiesce in whatever disposition you may make of them, and be satisfied with the result.

You deeded to me one-half of the Mansion House, and if it is your wish to have it back, make out the paper and it shall be executed.

Yours truly,

H. A. WILLARD.

152 The answer of Benjamin O. Tayloe to the bill of complaint and petition of Henry A. Willard.

This respondent, saving and reserving all exception to the bill of complaint, &c., nevertheless now answering the same in so far as he is advised that an answer from him is material, for answer says: He admits the execution and validity of the deed from Joseph C. Willard to Henry A. Willard, of August 21st, 1861, of which a copy is exhibited with said bill, the said deed being a matter of record, but this respondent had nc personal knowledge of the existence of the same till after the filing of the bill of said Joseph C. Willard in this cause. Of any other dealings and transactions relative to the premises between said Joseph C. Willard and Henry A. Willard and other relative interests and reciprocal rights in regard to the property to which this suit relates, as determined by any contract or course of dealing between themselves, this respondent has no personal knowledge. He has signed receipts prepared by said Joseph C. Willard for rent, which, since the filing of said bill, he has observed were given
153 to said parties jointly. And for answer to so much of said bill as asserts a claim to a conveyance from respondent to said Henry A. Willard jointly with said Joseph, respondent refers to and adopts the averments contained in his answer to the bill of complaint of said Joseph C. Willard, and he prays to be hence dismissed with his reasonable costs, &c.; without this, &c.

BENJ. OGLE TAYLOE.

COX & W. Y. FENDALL, *Sol'rs, &c.*

Filed April 25, 1865.

B. Ogle Tayloe, the above respondent, makes oath in due form of law that the matters stated in the foregoing answer are true to the best of his knowledge, information, and belief.

(Signed) R. J. MEIGS, *Clerk.*

In the clerk's office, June 3, 1865.

WILLARD
v.
TAYLOE. } 207.—Equity.

By consent of Messrs. Kennedy & Davidge, solicitors for complainants, and Messrs. Cox & Fendall, solicitors for defendant, Tayloe, this cause is set for hearing.

By the clerk.

154 In sup. court Dist. of Col'a, in equity.

JOS. C. WILLARD
v.
BENJ'N O. TAYLOE. } No. 207.

It is agreed that in this cause a decree pro forma shall be passed at the special term, dismissing the bill, and an appeal entered to the general term.

June 20, 1865.

GEORGE HOWE,
Solicitor for Orator.
COX & FENDALL, *for Def't.*

In the special term, July 5, 1865.

JOS. C. WILLARD
v.
BENJ'N O. TAYLOE. } In equity.—No. 207.

This cause coming on for hearing upon the agreement of counsel of June 20, 1865, it is ordered, adjudged, and decreed that the bill be dismissed with costs; and from this decree the complainants pray an appeal to the gen'l term, and it is allowed.

In the gen'l term, October 27, 1865.

JOS. C. WILLARD
v.
BENJ. OGLE TAYLOE. } Eq. 207; doc., 7.

This cause standing ready for hearing, and being submitted on the bill, answers, exhibits, evidence, and other papers and proceedings in this cause, the counsel for the parties were heard, and the proceedings being read and considered, it is thereupon, this 27th day of October, in the year 1865, adjudged, orrdered, and decreed that the bill of complaint of the complainant be, and the same is hereby, dismissed, and that the complainant pay the defendant the costs of this suit; from which decree the complainant prays an appeal to the Supreme Court of the United States, which is allowed upon complainant executing his bond to the defendant in the sum of twenty thousand dollars, conditioned to prosecute this appeal with effect, and abide by such decree as the said Supreme Court shall make.

By the court.

155 WASHINGTON, D. C, *Oct.* 27, 1865.

It is hereby agreed that Joseph C. Willard may have fifteen days within which to file his bond for twenty thousand dollars for his appeal in the case of Willard *v.* Tayloe.

GEO. HOWE,
Solicitor for Willard.
W: Y. FENDALL, *Sol'r for Def't.*

Filed Octo: 27, '65.

Appeal bond.—Filed Oct. 30, 1865.

Know all men by these presents that I, Joseph C. Willard, of Washington and District of Columbia, as principal, and I, Thomas Furse, of Washington, as surety, are held and firmly bound unto Benjamin Ogle Tayloe, of Washington, in the sum of twenty thousand dollars current money of the United States, to be paid to the said Benjamin Ogle Tayloe, his heirs, executors, administrators, or assigns, for the payment of which we hereby bind ourselves, our heirs, executor, administrators, and assigns firmly by these presents. In witness whereof, we have hereunto set our hands and seals on this twenty-seventh day of October, in the year of our Lord one thousand eight hundred and sixty-five.

The condition of this obligation is such, that whereas the
156 said Joseph C. Willard, on or about the twenty-fifth day of April, A. D. 1864, brought his bill of complaint against Benjamin Ogle Tayloe to enforce the specific performance of a contract to convey a piece of real estate situated in Washington, D. C., and known as the Mansion House property; and whereas the supreme court of the District of Columbia has this day adjudged and decreed that the bill brought by said Joseph C. Willard be dismissed with costs, from which decree the said Willard has appealed to the Supreme Court of the United States:

Now in case the said Joseph C. Willard shall prosecute his said appeal to effect, and shall pay or cause to be paid unto the said Benjamin Ogle Tayloe, his heirs, executors, administrators, or assigns, all costs occasioned by the appeal aforesaid, together with all intervening damages, including all costs and profits that may accrue to the said Joseph C. Willard, his heirs or assigns, or be received by him or them from the said Mansion House property, then this obligation to be null and void; otherwise to remain in full force and effect.

J. C. WILLARD. [SEAL.]
THOMAS FURSE. [SEAL.]

Signed and sealed in the presence of—
A. A. SLOAN.

Approved: ANDREW WYLIE.

Filed December 8, 1865.

Supreme Court of the United States.

JOSEPH C. WILLARD
vs.
BENJAMIN C. TAYLOE. } No.

AN APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF OF APPELLEE'S COUNSEL.

Statement.

This was a bill filed to enforce a specific performance of an agreement of sale contained in a lease.

On the 12th of April, 1854, Benjamin O. Tayloe leased the property in controversy to Joseph C. Willard, for the term of ten years from May 1, 1854, at an annual rent of $1200, and covenanted in the following words, viz: "It is hereby also agreed that said Joseph C. Willard, his executors or assigns, shall have the right or option to purchase the above described lot or piece of ground, together with all the buildings and improvements thereon, at any time before the expiration of the lease aforesaid, on paying or securing to be paid for the same the sum of twenty-two thousand five hundred dollars, payable as follows: Two thousand thereof in cash, and two thousand, together with the interest on all the deferred instalments, in each and every year thereafter, till the whole is paid, the deferred payments to be secured by a deed of trust on the property, and a good warranty deed is to be given to the said Willard, his heirs *or assigns*, except only as to the yearly ground rent of $290 now existing against said property, and subject to which it is understood that said deed is to be made."—See page 2 of Record.

On the 27th of August, 1861, Jos. C. Willard, by an indenture which recited the aforegoing lease and covenant to convey, *assigned* to his brother, Henry A. Willard, as follows, viz: "One undivided moiety or half part of and in the said piece or parcel of ground in the said hereinbefore in part recited indenture of demise particularly described, together with the equal undivided moiety or half part of the said lease of said premises, for the residue of the said term of ten years therein mentioned, and also all the advantages, rights and interests in the agreement of purchase and covenants on the part of the lessor therein contained, so that the said Henry A. Willard, his executors, &c., shall and may be henceforth equal copartner therein, with the said Joseph C. Willard, his executors, &c."--See p. 58 of Record.

This was one of the papers and prooceedings upon which the cause was set for hearing. The certificate of the Register of Deeds makes it legal evidence, and rendered it unnecessary to offer other proof of it. See act of Congress of Feb. 14, 1863, (12 Stat., 651); 1 Greenleaf on Evidence, sec. 485; Carroll's Lessee *vs.* Llewellyn, 1 H. & McH, 162; Smith's Lessee *vs.* Steele, 3 H. & McH., 103.

In fact, the complainant himself proves the fact of the assignment, in endeavoring to avoid its effect. After the filing of the defendant's answer and of this copy of the assignment, and the closing of defendant's deposition, it appears (Record, p. 66) that complainant's counsel, Mr. Kennedy, filed a letter marked Exhibit B, (Record, p. 67) from Henry A. Willard to complainant, stating the fact of the assignment, and offering to reconvey the property. This evidence was offered by complainant by way of confession and avoidance of the assignment, but it fails to avoid its effect, because the suggestion of the letter was never carried out.

It further appears that the receipts for rent produced by complainant, given by Tayloe after the date of the assignment, August, 1861, were all given to Joseph and Henry Willard, jointly.

Shortly before the expiration of the ten years of the lease, viz: In April, 1864, Jos. C. Willard offered to pay $2000 in

legal tenders to Tayloe, as the first instalment of the purchase money, and sent a deed in fee to be executed by Tayloe to him, as also, the draft of a deed of trust which he offered to execute, to secure the deferred instalments of purchase money.

The deed of trust contained a provision giving to Willard the option to *anticipate any or all of the deferred instalments and to pay them at any time, with a proper rebate of interest*.—See p. 6–11 of Record.

The money was refused, and the deed returned by Tayloe.

The evidence as to the deeds is, that the complainant first enclosed the blank deed of trust, exhibited in the record, and a deed to be executed by Tayloe, which the bill admits was not in conformity with the terms of the lease, and that these papers were returned to complainant by letter; that subsequently another deed was prepared and sent with the same deed of trust, to defendant's house, at two different times, but the messenger failed to see the defendant, in consequence of his absence from home. The complainant swears he directed his agent to leave the papers with Mr. Tayloe to examine and report what alterations he might desire in them, if any. But even this was not made known to defendant, and there was no offer, or instruction to offer, to the defendant, to execute any other than the deed of trust so sent.—See pp. 25, 65.

As to the cash payments, it appears that complainant at first enclosed a check on a New York bank to the defendant, which was retnrned; that he subsequently offered, in person, as he testifies, to pay the $2000 in legal tenders, and again sent the amount by the same agent who carried the deeds and failed to see the defendant.

This bill was thereupon filed for a specific performance.

Henry A. Willard took no part in the application to Tayloe, although he had sent his check to Joseph C. Willard for $10,000, which he erroneously supposed to be his half of the purchase money. He filed a petition in this cause, on the 6th of March, 1865, to be made party to the suit, and to share in any relief to which Joseph is entitled.

POINTS.

1. The effect of the assignment by Joseph to Henry Willard:

The covenant to convey is one which runs with the land. A covenant for renewal, in a lease, was long since held to be such.—See Roe vs. Hawley, 12 East., 464. And this is the same case in principle. It is a covenant to convey in fee, instead of for years, which a covenant for renewal is. But a covenant to convey in fee is expressly recognized as one running with the land.—Van Horne vs. Crain, 1 Paige, 455.

An assignment of a part of property leased, *whether an entire or undivided part*, carried with it both the benefit and burden of covenants in the lease, which run with the land.—See Sugden on Vendors. 508, and cases cited.

Twynam *vs.* Pickard, 2 B. & Ald., 105.
White *vs.* Whitney, 3 Metcalf, 87.
Van Horn *vs.* Crane, sup.
Astor *vs.* Miller, 2 Paige, 68.
Dougherty *vs.* Duvall's heirs, 9 B. Monroe, 58.
Dickenson *vs.* Hoomes, adm'r., 8 Grattan, 406.

The conveyance from Joseph C. to Henry A. Willard was not an underletting, but was an absolute assignment of the lease, and covenant, as it was expressed to be, as to one undivided moiety, and passed the estate in that moiety with the benefit of the covenants in the lease.

Gannon *vs.* Vernon, 2 Levinz, 231.
Merceron *vs.* Dowson, 5 Barn. & Cress., 479.
Wollaston *vs.* Hakewill, 3 Man. & Grau., 297.

The effect of the assignment, then, is to give to Joseph and Henry Willard, in relation to each other, and to Tayloe, the same rights, and to impose upon them the same obligations, as if the lease had been made to them, in the first instance, as tenants in common. The covenant of Tayloe, to convey, then became a covenant to convey *to them*, on *their* payment of the cash instalment of purchase money, and *their* executing the deed of trust, &c.

III. The rights and duties created by the covenant:

It was a covenant to convey an estate on certain condi-

tions precedent. These conditions must have been strictly performed, both as to time and terms. Equity cannot relieve against a failure, and vest an estate dependent on a condition precedent, where it will not vest at law.

Popham *vs.* Barnfield, 1 Vernon, 83.
Cary *vs.* Bertie, 2 Ib., 339.
Wells *vs.* Smith, 2 Edwards, 78; 1 Story's Equ., Jur. § 288.

The covenant was, in effect, a continuing, open offer, during the lease. The moment the lease expired, the offer was withdrawn, by operation of law. It could not be accepted afterward, nor could it be accepted during the lease, on any other terms than were therein mentioned, nor was a proposal to vary those terms, in any sense, an acceptance or an act which the lessor was bound to notice at all.

See Frish *vs.* Lawrence, 1 Paige Ch. R., 435.
Wells *vs.* Smith, 7 Id., 22.

The covenant was inseparably connected with the estate for years, and expired with it.

It was a case in which time is of the essence of the contract. It was not an absolute agreement of sale, but a contract giving an election to buy or not, on certain conditions, in which the benefit was all on one side, and the party must be held strictly to his contract.

III. What was done by the lessees entitling them to performance of the covenant?

1. Joseph and Henry were to demand a conveyance to them both, and nothing else, for this was Tayloe's obligation. Joseph demanded it in his own name only.

2. Joseph and Henry were to pay the cash instalment of $2,000.

Joseph offered it on his own account, and in his own name. This is no more the act of Henry, or the joint act of the two, than if a stranger had made the offer on his own account; and no ratification can make it such.

3. The deed of trust was to be executed by both. Joseph alone offered to do it. It is true, that a conveyance to him, by Tayloe, would have enabled him to pass the entire *legal*

estate, by a deed of trust. But up to the last moment of the lease, Henry had a right in equity, to call for the legal title, as to one moiety, upon compliance with the conditions of the purchase, which equity would not have been affected by a deed from Tayloe to Joseph, and a deed of trust from the latter. Consequently, a deed of trust from Joseph would not have been a security on more than one moiety of the property.

4. The deed of trust was to secure the purchase money on this property in payments at certain periods. The deed of trust which Joseph C. Willard offered to execute, gave him the privilege of making the payments at different periods, when, on account of the condition of the currency, it might have been most disadvantageous to Tayloe to receive them.

It is therefore plain that there was no offer during the term, to purchase the property, by the party entitled, or in the terms of the covenant of sale, contained in the lease. There is, therefore, clearly, no obligation on the part of the lessor, to convey to the lessee or his assigns.

5. All these offers, of money and securities, were accompanied by a demand, and so made on condition that the defendant would convey the property—not to the two persons who were entitled to receive the conveyance, but to one to the exclusion of the other.

6. The only offer of payment ever made was in legal tender notes. This offer was not according to the terms of the contract.

(a.) Because such notes are not a legal tender for any purpose.

(b.) Because, if a legal tender, they are a legal tender only for debts, and the amount to be paid in order to entitle the complainant to a conveyance, was not a debt or obligation of any kind; but its payment was simply the performance of a condition.

Under all the circumstances of the case, the agreement is one which ought not to be enforced specifically.

All the dealings between the parties show that their original intent was simply to secure to the complainant the control of

the property for ten years, to prevent competition with his hotel. Rec. pp. 27–46. The agreement was made while the Mansion House was under *lease* to another party, and during the time the defendant did not exact the full rent secured to him by the agreement. For nearly one-half the entire term, May 1854, to August 1858,) he only demanded $700, instead of $1,200. Rec., p. 43.

In the interval, a great and unexpected change had taken place in the value of the property, it yields now six times the rent received, Rec. 37, but before this took place, in 1860, the defendant had notified the complainant that the agreement did not express the true understanding of the parties, Rec., p. 48. It is true, that this has not been made a ground for seeking to set aside the agreement; but, at least, the complainant had fair notice that he must stand on his legal rights, and if he has not entitled himself, by full and exact performance, to the relief he claims, there is nothing whatever in his case to entitle him to the favor of the court.

JOHN D. McPHERSON,
WALTER S. COX,
of Counsel for Defendant in Error.

Supreme Court of the United States.

December Term, 1867.

JOSEPH C. WILLARD

VS.

BENJAMIN O. TAYLOE.

BRIEF FOR THE COMPLAINANT.

BOSTON:
ALFRED MUDGE & SON, LAW PRINTERS, 34 SCHOOL STREET.
1867.

Supreme Court of the United States.

December Term, 1867.

JOSEPH C. WILLARD

vs.

BENJAMIN O. TAYLOE.

BRIEF FOR THE COMPLAINANT.

This is a bill for the specific performance of a contract to convey that real estate in the City of Washington, known as the "Mansion House," fronting on Pennsylvania Avenue, and in immediate connection with what is generally known as "Willard's Hotel."

In the month of May, 1853, the complainant and his brother, Henry A. Willard, purchased of the respondent and W. H. Tayloe, the "Willard Hotel" property. At this time the importance of the "Mansion House" property to the complainant, from its proximity to, and connection with the Willard Hotel property, was understood and recognized by the respondent as well as by the complainant, and the respondent then engaged not to sell it to any one for a hotel to be built on it, for ten years, and that Messrs. Willard should have the refusal of it at $22,500. (p. 27, 46.)

On the twelfth day of April, 1854, the respondent leased to the complainant the "Mansion House" for ten years, from the first day of May, 1853, at a yearly rent of $1,200. The buildings were very much dilapidated and the estate was then under lease at a rent of $700 a year. (p. 23.)

The lease to the complainant contained the following covenant:

"It is hereby also agreed that the said Joseph C. Willard, his executors or assigns, shall have the right or option to purchase the above-described lot or piece of ground, together with all the buildings and improvements thereon, at any time before expiration of the lease aforesaid, on paying, or securing to be paid for the same, the sum of twenty-two thousand five hundred dollars, payable as follows, two thousand thereof in cash, and two thousand, together with the interest on all the deferred instalments, in each and every year thereafter, till the whole is paid; the deferred payments to be secured by a deed of trust on the property. And a good warranty deed is to be given to the said Willard, his heirs or assigns, except only as to the yearly ground, rent of three hundred and ninety—— dollars, now existing against the said property, and subject to which, it is understood the said deed is to be made. And the said Joseph C. Willard doth hereby covenant and agree to and with the said Benjamin O. Tayloe, that he will pay the rent aforesaid when and as the same shall fall due; that he will keep the said premises in good and reasonable repair, and should he not think proper to avail himself of the privilege of purchasing, hereinbefore stipulated for, that at the expiration of the said term he will surrender the said premises to the said Benjamin O. Tayloe, his heirs or assigns, in as good condition as they are now in, reasonable wear and tear and accidents only excepted.

"And it is mutually agreed between the said parties that the said Willard is to have the right to put, erect, and build any houses, tenements, or other structures he may think proper, upon the said premises, during the lease aforesaid, and in order to do so to advantage, may pull down and remove the buildings now upon the ground, and make use of the materials thereof in the construction of the new improvements."

It will be observed that the sum of $22,500 is the same as

had been agreed on as part of the arrangements for the purchase of the Willard Hotel property. The complainant has testified that the market value of the property when he took the lease was under $15,000 (p. 28), and neither the respondent nor any one else has expressed a different opinion. The Messrs. Willard proceeded to expend very large sums of money on the Willard Hotel property (p. 28, fol. 63), and thus enhanced the value of the Mansion House property (p. 28, fol. 64), and this property was of special value and importance to the complainant, beyond its general market value, for reasons given. (p. 26, fol. 60.)

On the 15th day of April 1864, fifteen days before the expiration of the time allowed for his election to purchase — the complainant addressed to the respondent the following letter:

WASHINGTON CITY, D.C., *April 15th*, 1864.

MY DEAR MR. TAYLOE: Enclosed please find check $2,000 on Bank of America in New York, am't due (on account purchase Mansion House property) on May 1st, 1864 together with receipt for same, which please sign and return by bearer. If agreeable to you, I will have the deed and deed of trust prepared between this and the 1st day of May.

Very respectfully, your ob't serv't,

J. C. WILLARD.

To this the respondent made answer as follows:

WAS., *15th April*, 1864.

DEAR SIR: Mrs. Tayloe is waiting for me to go out with her; I have no time now to look into the business, and return the check enclosed; I wish to see you for explanations before closing the matter.

BENJ. OGLE TAYLOE.

These exhibits are proved. (p. 23, fol. 54.)

The next morning the complainant called on the respondent; informed him that he had the $2,000 for the cash payment for

the Mansion House, and offered it to him. He refused it, saying that he would not accept greenbacks, — he understood the purchase money was to be paid in gold. That he would receive the gold and give a receipt. (pp. 23, 24, 31.)

In substance, the respondent admits this. (p. 65, cross-ints. 26, 27.)

The complainant then had prepared a deed of conveyance to himself and a deed of trust to secure the deferred payments, and sent them by one Ward to the respondent, who returned them with a letter. Ex. 4, p. 47. Between the 16th and the 29th of April, the complainant made repeated efforts to obtain a conveyance from the respondent, which are detailed in the bill, and not denied in the answer, and in support of these allegations in the bill, the proofs will be found on p. 20, 21, Hazard; 22 Kennedy; 24, 25, 26, Willard.

On the 29th of April, the day before the expiration of the time allowed for the purchase, the complainant filed the bill by which this suit was commenced.

I. Where a contract for the conveyance of lands, is in its nature and circumstances unobjectionable, it is as much a matter of course, for a Court of Equity to decree its specific performance, as it is for a Court of Law to give damages for its breach.

2 Story's Eq. § 751, and cases cited.

II. When the complainant, within the prescribed time, notified to the respondent his election to purchase, the contract became complete. The covenant in the lease was a *continuing offer* to sell on the terms therein mentioned; and as soon as that offer was accepted, there arose a complete and concluded agreement.

Boston and Me. R. R. *vs.* Bartlett, 3 Cush. 224.
Welchman *vs.* Spinks, 5 Law Times (N. S.), 385.

Such acceptance might be by parol.

Bos. & M. R. R. *vs.* Bartlett, 3 Cush. 224.
Warner *vs.* Willington, 3 Drew, 523.

But here the acceptance was in writing, (p. 45, Ex. I.) and the respondent might have at once filed his bill against the complainant to compel specific performance.

Old Colony Railroad *vs.* Evans, 6 Gray, 25.

III. The tender of treasury notes by the complainant was sufficient. Though we are not aware that the constitutionality of the acts of Congress making treasury notes lawful money and a legal tender, has been passed on by this Court, we consider that the question has been practically settled, and the argument has been exhausted in the opinions delivered in the following cases. 3 9 12 4 6.

Metropolitan Bk. *vs.* Van Dyck, 27 N. Y. 400. Massachusetts
Thayer *vs.* Hedges, 23 Indiana, 144. 2 6 6 California 6 5 5
Van Hausen *vs.* Kandrese, 13 Mich. 303. 2 0 Wisconsin 119 2

IV. The parties disagreed as to the right of the respondent to demand such a sum in Treasury Notes as would purchase $2,000 in gold. Whatever may be the ultimate decision of this Court concerning this right, it was not unreasonable for the complainant to believe that he might lawfully tender Treasury Notes; and having done so, and finding that they were refused, he filed this bill before the expiration of the time allowed for the purchase; and having truly stated therein what he had offered to do, and the dispute between himself and the respondent, he goes on expressly to offer "to perform the agreement on his part *according to the true intent and meaning thereof.*"

Promptly and fully he placed the subject of dispute before the Court, submitted the question to its determination, and offered

to do whatever a Court of Equity should say he ought to do on his part; and if the Court should now be of opinion that the pretension of the respondent was well founded, though this will modify the decree, it will not be a bar to specific performance.

Chesterman *v.* Masser, 9 Hare. 206, was a bill by a lessee for the specific performance of an agreement to renew a lease, at the option of the lessee. The parties had differed about their respective proportions of a fine to be paid to the superior landlord, and the complainant had failed during three years to pay any part, on the ground that too much was demanded.

The Court said:

"It has been very strongly urged by Mr. *Selwyn*, that there was an improper amount of fine charged upon the plaintiff. If he so thought, he should have then come into a Court of Equity for the specific performance of the covenant, and put himself in the power of the Court, so as to enable the Court to compel him to pay a reasonable sum. If the plaintiff has the equity which he asserts, and that without applying to a Court of Equity to assess the amount of the fine, he might hold that equity not only for the three years for which it has been attempted to be held, but, for aught I can see, for twenty years longer, or an indefinite time, by simply saying, 'You have imposed an unreasonable fine upon me; I will not subject myself to the jurisdiction of a Court of Equity to ascertain the proper amount of the fine I ought to pay, and you have no means of resorting to a Court of Equity.'"

In the case at bar, the complainant took promptly and fully the course which the Court thus declared to be proper. No imputation of any laches is possible. It was not a want of good faith to believe that these Acts of Congress, on which the government and the citizens were constantly acting, and which have been held valid by every Court which has passed on them, were operative in his case. But he found himself confronted

with a question raised by the respondent, and he filed his bill to have that question settled, offering to do whatever a Court of Equity should require.

In Secomb *vs.* Steele, 20 How. 103–105, the principles on which a Court of Equity acts in such cases are fully stated.

No one of the defences set up by the answer is tenable.

I. A change in the value of the property is relied on.

It is clearly settled that if the contract was fair, and not grossly unequal *when made*, each party took the risk of subsequent events, and hardship arising out of them cannot be regarded.

Webb *vs.* London & P. R. R. Co. 9 Hare, 129.
Lawder *vs.* Blatchford, Beat. 522.
Low *vs.* Treadwell, 3 Fairfield, 441.
Fry on Specific Per. [107–116.]

It plainly appears that when this contract was made, both the rent reserved and the sum stipulated to be paid ($22,500), very largely exceeded the market value. The only rational conclusion is that this excess was attributable to, and was the price of the option.

II. The defence, that the covenant was obtained by some parol assurance that it would not be enforced, is not set up in the answer, and is wholly inconsistent with prominent and admitted facts.

III. The fact, that the draft of a trust deed sent by the complainant to the respondent did not conform to the contract, can have no legal bearing on the case.

(1.) It was no part of Mr. W's duty to have a trust deed prepared. This was a thing to be done by Mr. Tayloe when he should be ready to convey. Ward's dep. p. 44.

(2.) The parties never got so far as to differ about the form of the trust deed, and Mr. Tayloe returned it with the deed of conveyance, without objection. Ex. 4, p. 47.

(3.) The delivery of the deed of conveyance and of the deed of trust were to be concurrent acts, and an omission to make a tender of the latter could, under no circumstances, affect the complainant's rights so long as the respondent persisted in his refusal to convey.

Rutherford *vs.* Haven, 11 Iowa, 587.

IV. Henry A. Willard was not a proper, still less, a necessary party to the bill.

(1.) The alleged deed of assignment by the complainant to H. A. Willard, which is relied on by the respondent in his answer, is not put in evidence on the record, nor in any manner proved as against the complainant.

(2.) If it were, only the parties to the contract are proper parties to the bill; and a sub-purchaser of an undivided interest in the contract is not a necessary party.

Mandeville *vs.* Welch, 5 Whea. 277. 10 Sim 314
Tasker *vs.* Small, 3 M. & Cr. 63.
Humfries *vs.* Hollis, Jacob's R. 73. 1 Sim 64 280
Cuts *vs.* Thodey, 13 Sim. 206.
S. C. on appeal, 1 Coll. C. C. 223.
——— *vs.* Walford, 4 Russ. 372.
Long *vs.* Bowering, 10 Jur. (N. S.) 668.
Wood et al. *vs.* White, 4 M. & Cr. 460–483.
Chadwick *vs.* Waden, 9 Hare, 188, S. C. 12 Law & Eq. 180.

V. The objection on which the Court below dismissed the bill, that H. A. Willard is a necessary party to the deed of trust, is merely futile.

(1.) There is no evidence in the record to support it.

(2.) If the estate should be conveyed to the complainant in accordance with the contract, he alone can reconvey it in trust and the respondent has nothing to do with any equities existing between the complainant and H. A. Willard.

See cases last cited.

(3.) The whole subject of how the trust deed should be executed, belongs to the master, after the Court shall have decreed specific performance.

See Paine *vs.* Hutchinson, Law Rep. (Equity,) Vol. 3, p. 257.

(4.) H. A. Willard was before the Court by his petition and the Court could have directed him to join in a conveyance, if it had been necessary; which plainly it was not.

2

Geo. Howe

Solicitor for Complainant.

4Pu 327

In the Supreme Court of the United States.

No. 71.—DECEMBER TERM, 1867.

J. C. WILLARD *vs.* B. O. TAYLOE.

The facts of this case are stated sufficiently in the brief filed by counsel for complainant, except so far as relates to the interest of H. A. Willard.

It is proposed, on the behalf of Henry A. Willard, who, although not a party named in this appeal, is shown by the record to have an immediate interest in the decision, to submit some points for the consideration of the Court which are not fully developed in that brief.

The record (p. 56 to 61) shows that Henry A. Willard filed his petition, in the Court below, to be made a party complainant in the cause, setting up a deed from the complainant of one undivided moiety in the lease, and the covenants for sale on which the bill rests, and which it seeks to enforce, and that he put into complainant's hands what he understood to be one-half of the purchase money under that covennant.

To this the defendant, Tayloe, (p. 67,) filed his answer.

No order of the Court was made on this petition or answer; but the solicitors of Jos. C. Willard, the complainant, (the printed copy of the record has it erroneously *complainants*,) (p. 68,) and for the defendant, Tayloe, set the case for hearing, and the decree (p. 68) shows that the bill of complaint was dismissed, and an appeal prayed and allowed to him. There was no decree against Henry A. Willard.

It is submitted that the Court ought to have disposed of his petition to be admitted as a party complainant, and there is error on the record in the failure to do so.

But, it is further submitted, that it was not material for the Court to have required him to be made a party.

And, second, that the whole case, as between the complainant and defendant, can be disposed of by this Court on this bill.

And, third, the Court below erred in dismissing the bill.

As to the first point: In Tasker *vs.* Small, 3 Myl. & Cr., 68, Ld. Chancellor Cottenham says: "It is not disputed that, generally, to a bill for a specific performance of a contract of sale, the *parties to the contract only* are the proper parties. * * But in equity, as well as at law, the *contract* constitutes the right and regulates the liability of the parties, and the object of the proceedings is to place the party complaining as nearly as possible in the same situation as the defendant agreed he should be placed in. It is obvious that persons *strangers to the contract* are, therefore, neither entitled to the rights nor subject to the liabilities which arise out of it—are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to answer damages for the breach of it. And so is the admitted practice of the Court."

And so in Chadwick *vs.* Madden, 13 Sim., 190, 191, Sir Geo. Jas. Turner, Vice-Chancellor, says: "The bill distinctly alleges that Madden became the purchaser and signed the agreement, and that Lees claims an interest in the contract under some agreement entered into with Madden; and it does not appear to me that the next allegation, which was most relied on in the argument on this point—*that in fact Madden entered into the agreement as well on behalf of Lees as of himself*—is inconsistent with Madden's being the sole purchaser, as it may be that he alone purchased from the plaintiff, though he made the purchase on his own as well as on Lees' behalf; and the succeeding allegation proves this was

intended by the bill; for it is, that *Madden has by writing declared himself to be a trustee* for Lees in respect of some interest in the contract; and, in addition to this, the bill charges that the plaintiffs have never been made parties to any substitution of Lees for Madden, and that Madden is the person liable under the contract." And the bill was dismissed as to Lees.

And again in Story *vs.* Livingston, 13 Pet., 375, this Court says: "The general rule certainly is, that all persons materially interested in a suit ought to be parties to it, either as plaintiffs or defendants, that a complete decree may be made between those parties. Caldwell *vs.* Taggart, 4 Pet., 190. But there are exceptions to this rule, and one of these is, where a decree in relation to the subject-matter of litigation can be made without a person who has an interest having that interest in any way concluded by the decree. Bailey *vs.* Inglee, 2 Paige, 122; also Joy *vs.* Wurtz. Wash. C. C. R., 577, where the rule is comprehensively expressed as to active and passive parties." And see the whole matter very fully discussed in 1 Dan. Ch. Pr., 3 Am. ed., p. 181, et seq., and particularly p. 224.

In answer to this, it is said this is a covenant running with the land, and therefore the assignee is not a stranger. But it is not a covenant binding the assignee to do anything, and is at most a privilege which he may or may not exercise. In Humphrey *vs.* Hollis, Jac. 73, Sir T. Plummer, Master of the Rolls, says: "It is clear that Wilkins' wife could not be affected by the contract; but it is argued that she might adopt it and claim to have it performed: to which the answer is, she has not attempted so to do; and it is therefore not necessary to decide whether she could or not. If she were made a party she might disclaim, and the bill must then be dismissed as against her with costs." That was a bill by the purchaser to set aside an agreement of purchase

of land against a man who was seized in right of his wife of a part of the estate, and died pending the suit. A bill of revivor was filed against his executor, and it was insisted that the wife should be made a party.

So in this case Henry *might* have filed his bill if such act were necessary; but it does not follow that Joseph could not file the bill and compel a conveyance.

And this leads us to the next point that the whole case, as between the complainant and defendant, can be disposed of by this Court in this bill.

Henry certainly took under this assignment no more than a right to purchase a moiety at his option. It is said to be a covenant running with the land, and therefore he might have demanded execution as to one moiety, and could, on a refusal, have sued at law, or brought a bill for a specific execution. If Henry did not elect to purchase, could Joseph have maintained an action or brought his bill for his moiety? If so, he can maintain this suit, and the Court erred in dismissing his bill

Could Henry's failure or refusal to purchase defeat Joseph's right? This is the test of the case. Joseph had never parted with his right to purchase. The contract of sale was an entire contract; and, in order to complete it, Joseph must be in condition to comply with its terms. If Henry "unconscientiously refuses to join with his co-tenant in doing an act which is for the benefit of the estate of both, a Court of equity will compel him to join or permit the co-tenant to do it for his own benefit, provided it can be done without injury to either." Van Horne *vs.* Crane, 1 Page, 460.

If Henry did not make his election before the end of the lease, he could not maintain any action at law or in equity. So no harm could come to him or to Tayloe. If he did offer to purchase, it must have been in conjunction with

Joseph. If he had not tendered himself ready to comply, the Court would have compelled him to comply to protect Joseph's rights, or let Joseph sue alone; and if he had brought his bill, the Court would have consolidated the two bills. This would "place Joseph in the same situation as Tayloe agreed he should be placed in." 3, My. & Cr., 68.

It is not pretended by the defendant that Henry ever did make the offer to him. No action, therefore, at law or in equity will lie by him against the defendant. Joseph has never released or waived his right, but has diligently pressed it; and the Court will permit him to pursue his remedy alone, and to take title to the whole property in order to protect his moiety—for, in his doing so, Tayloe has no right to complain and sustains no injury; and as to Henry, Joseph either takes, as trustee for him, of one moiety, or he takes the whole in his own right. But it is apparent that Henry, so far as Joseph is concerned, has complied, or intended and offered to comply, with his obligation, and that Joseph would take as trustee for him. The true solution of the whole matter may be briefly summed up as follows:

Joseph having a right to purchase on certain terms, under a covenant running with the land, conveys to Henry one moiety of that right to purchase. Before the period limited for the purchase has passed, Henry puts in Joseph's hands what he understands to be one-half of the purchase money, to enable him to comply with the terms of purchase, and now offers to comply fully with all the terms, and this creates Joseph his agent and trustee to complete that purchase. Joseph proceeds to complete the purchase according to the terms of the original agreement. Both parties are therefore insisting on the specific execution of the contract of sale, and it is not questioned that an authority given by Henry to Joseph to complete the sale would authorize Joseph to take a deed from Tayloe, and give the deed of trust required by

the contract of sale, and that this transaction would enure to the benefit of Henry so as to make him a tenant in common with Joseph.

JOS. H. BRADLEY,
Sol. for H. A. Willard.

3 Codices 505- 576

525-

3 Texts 324

~~4 Texts~~ 3

1 Incomplete

2 Original Collection

1 Duplicate 365

274

Mr. Justice Clifford

Supreme Court of the United States.

December Term, 1867.

JOSEPH C. WILLARD

VS.

BENJAMIN O. TAYLOE.

ARGUMENT FOR THE COMPLAINANT.

ARGUMENT OF MR. CURTIS.

Mr. CURTIS. *May it please your Honors.* This is a bill for the specific performance of a contract to convey that real estate in the city of Washington, known as the "Mansion House," fronting on Pennsylvania Avenue, and in immediate connection with what is generally known as "Willards' Hotel."

In the month of May, 1853, the complainant and his brother, Henry A. Willard, purchased of the respondent and W. H. Tayloe, the "Willard Hotel" property. At this time the importance of the "Mansion House" property to the complainant, from its proximity to and connection with the Willard Hotel property, was understood and recognized by the respondent as well as by the complainant, and the respondent then engaged not to sell it to any one for a hotel to be built on it, for ten years, and that Messrs. Willard should have the refusal of it at $22,500.

On the twelfth day of April, 1854, the respondent leased to the complainant the "Mansion House" for ten years, from the first day of May, 1854, at a yearly rent of $1,200. The buildings were very much dilapidated, and the estate was then under lease at a rent of $700 a year.

The lease to the complainant contained the following covenant:

"It is hereby also agreed that the said Joseph C. Willard, his executors or assigns, shall have the right or option to purchase the above described lot or piece of ground, together with all the buildings and improvements thereon, at any time before expiration of the lease aforesaid, on paying, or securing to be paid for the same, the sum of twenty-two thousand five hundred dollars, payable as follows: two thousand thereof in cash, and two thousand, together with interest on

all the deferred instalments, in each and every year thereafter until the whole is paid; the deferred payments to be secured by a deed of trust on the property. And a good warranty deed is to be given to the said Willard, his heirs or assigns, except only as to the yearly ground-rent of three hundred and ninety dollars, now existing against the said property and subject to which it is understood the said deed is to be made. And the said Joseph C. Willard doth hereby covenant and agree to and with the said Benjamin O. Tayloe that he will pay the rent aforesaid when and as the same shall fall due; that he will keep the said premises in good and reasonable repair, and should he not think proper to avail himself of the privilege of purchasing, hereinbefore stipulated for, that at the expiration of the said term he will surrender the said premises to the said Benjamin O Tayloe, his heirs or assigns, in as good condition as they are now in, reasonable wear and tear and accidents only excepted.

"And it is mutually agreed between the said parties that the said Willard is to have the right to put, erect and build any houses, tenements or other structures he may think proper, upon the said premises, during the lease aforesaid, and in order to do so to advantage may pull down and remove the buildings now upon the ground, and make use of the materials thereof in the construction of the new improvements."

At that time this Mansion House property was very much dilapidated. The estate was then under lease at the rate of $700 a year. This lease stipulates to pay $1,200 a year for a period of ten years, and contains this option to purchase also and to make alterations upon the premises by taking down buildings and erecting others at Mr. Willard's pleasure. I should say in this same connection that the complainant has himself testified in the case, that at the time he took this lease and acquired this option, the market value of this property was under $15,000. He agreed to pay $22,500, if he should elect to purchase. And that opinion, neither the respondent who has been examined in this case, nor any other witness has controverted. It stands, therefore, as a fact proved in this case, that at that time the market value of this property was $15,000. The Messrs. Willards proceeded, after this lease was made, to expend from time to time large sums of money on the Willard Hotel property, as appears by

the record on page 28. They thus enhanced the value of this Mansion House property, and this Mansion House property was of special value to the complainant beyond its general market value for reasons as given at length on the record, and which it is not necessary now to read, showing that it was important for them to have control of this property in connection with the Hotel, in order that they might use it in connection with the Hotel, either as a permanent extension thereof, when they had more guests than could be accommodated in the house, and, secondly, because it was more important to them to have control of that property so that no other hotel could be built upon it in such immediate proximity to Willards' Hotel. These considerations the complainant says induced him to agree to pay this sum, provided he could complete the purchase and acquire title to the property before the expiration of the lease. On the 15th day of April, 1864, the lease expiring on the 1st day of May, which was ten years from the 1st day of May, 1854, fifteen days before the expiration of the time allowed to purchase at his option, the complainant addressed the respondent a letter, which is in these words:

"WASHINGTON CITY, D. C., *April* 15, 1864.

"MY DEAR MR. TAYLOE—Enclosed please find check for $2,000 on Band of America, in New York, amount due (on account purchase Mansion House property) on May 1st, 1864, together with receipt for same, which please sign and return by bearer. If agreeable to you, I will have the deed and deed of trust prepared between this and the 1st of May.

"Very respectfully,

"Your obedient servant,

"J. C. WILLARD."

To that the respondent made this answer:

"WASHINGTON, 15th *April*, 1864.

"DEAR SIR—Mrs. Tayloe is waiting for me to go out with her; I have no time to look into the business, and return the check enclosed; I wish to see you for explanations before closing the matter.

"BENJ. OGLE TAYLOE."

The next morning the complainant called on the respondent and informed him that he had two thousand dollars in his possession to make the cash payment for the Mansion House, and offered it to him. Mr. Tayloe refused to accept it, saying that he could not accept greenbacks; that he understood the purchase money was to be paid in gold, and that he would receive gold and go on to convey the property. In substance Mr. Tayloe admits this. Although his testimony is somewhat confused in parts, yet the Court will find, on examining it, that in substance he did give Mr. Willard to understand that if he would pay gold (which he said he understood was to be paid) he would complete the sale. The complainant then had prepared a deed of conveyance to himself and a deed of trust to secure the deferred payments, and sent them by one Ward, (being employed by him as a messenger,) to offer them to Mr. Tayloe. They were returned by Mr. Tayloe without being executed. It is not material to read the letter accompanying. I would only state that Mr. Tayloe finds some fault with Mr. Willard for the manner in which he says the contract was secured. He returns the deed without finding any fault with the form in which it was prepared, and because gold was not paid instead of greenbacks. He says that Mr. Willard would have the time between the 16th and 29th of April, the option expiring on the 1st of May; and that he wished to see him on the subject. The complainant made repeated efforts to obtain a conveyance from the respondent, which are detailed in the bill, and not denied in the answer. In support of these allegations in the bill, proofs will be found on record. There is a witness by the name of Hazard examined, who read the deed —a competent witness—and another by the name of Kennedy. Mr. Willard himself testifies to the efforts made to obtain such a conveyance.

On the 29th of April, finding that Mr. Tayloe had left town, (not that it is intimated he left to avoid this engagement, but probably for good reasons,) but finding that he had left town, and that the complainant was not going to obtain the conveyance before the time the option expired, on the

29th of April, he files this bill; and in the bill, as the Court will find, he sets out the contract. He stated what he had done, and stated truly, to obtain a conveyance of the property. He stated that he had tendered to Mr. Tayloe $2,000 in greenbacks; that Mr. Tayloe refused because, he alleged, the contract called for gold; that he had a right to gold, and thereupon, in this bill, he offers to do whatever his contract equitably requires him to do, and asks for a compliance with the contract.

I believe these are the material facts. Now we come to the defences which are set up in the case. In the first place, we submit that the contract for conveyance and lease is in its nature and circumstances unobjectionable. It is as much a matter of course for a court of equity to decree a specific performance of that contract as it is for a court of law to give damages for its non-performance. On this point we have referred to 2 Story's Equity, sec. 751, and the cases therein cited. Now, when this complainant within the prescribed time notified the respondent of his election to purchase, we submit that the contract became complete. This option, as it is called, which is contained in the lease, was in the nature of a continuing offer to sell. It amounted to this: "I agree that at any time within ten years I offer to sell, and you may purchase, on certain terms therein mentioned." Therefore, it is in its nature a continuing proposition upon the part of Mr. Tayloe, and it was a proposition from which he was not at liberty to withdraw. This subject the Court will find somewhat discussed in two cases referred to in the Brief, the Boston and Maine Rrailroad *vs.* Bartlett, 3 Cush. 224, and Welchman *vs.* Spinks, 5 Law Times (N. S.) 385. It seems also well settled that such a proposition may be accepted by parole. The proposition itself must be in writing, and it shall contain all the terms which are essential. The contract must be signed by the party or somebody authorized by him. But the acceptance of the proposition may be by parole, as is settled in two other cases, to which I refer, but which I will not now read. Here, however, the acceptance was in writing and by letters in which he sends Mr. Tayloe

a check for $2,000, and tells him it is on account of the first payment for the Mansion House property. The proposition, therefore, during the time allowed for the option was accepted in writing by Mr. Willard; and upon that it would have been competent for Mr. Tayloe, if Mr. Willard had afterwards refused to perform it, to have filed a bill and compelled Mr. Willard to purchase it; because the vendor as well as the purchaser may file a bill. The vendor may file a bill to recover his purchase money and compel the vedee specified to pay him; and the vendee may file a bill against the vendor and compel him to convey the property stipulated.

The first question of importance, then, which arises here is: was this tender of $2,000 in Treasury notes a sufficient tender? Well, in regard to that, I understand that it is already before this Court in various forms, and has been fully argued, perhaps, more than once. It has also been very exhaustively discussed in cases which are upon the brief, in New York, Indiana, Vermont, Massachusetts, California, and Wisconsin. I do not propose to trouble the Court by reading them in this argument. Upon the part of the complainant we look upon this question as, perhaps, practically settled. If the Court desire argument on the subject, in addition to those already made, I am sure I can add nothing that will not be found in these cases. I assume, therefore, that the Court will say that this was a full tender

Mr. Justice CLIFFORD. On the fifth page of your brief, after the citation "New York" is written the word "Massachusetts." To what does that refer?

Mr. CURTIS. There is no printed volume which contains it. The opinion of the Court was published in a newspaper, and I put that into your honor's possession. I have not a copy of it myself. It is in no authorized report; but that was a correct publication of it, I believe. I remember to have read it at the time. I can procure from the reporter the manuscript copy, I presume, if your honor desires. The Court did not discuss the question at all. They did not seem inclined to go at large into these inquires.

Mr. Justice CLIFFORD. I recollect now that you gave me the case. I was not aware that this referred to the same.

Mr. CURTIS. Suppose, however, that your honor should consider either that this was not a good tender, because the acts of Congress, which made it so, were not in conformity with the Constitution, or that your honor should think that a party coming into a court of equity and asking for a specific performance of a contract, could not insist on his adversary's taking Treasury notes under a contract made before these acts were passed, what then?

Mr. Justice FIELDS. What was the value of Treasury notes at that time?

Mr. CURTIS. I have no knowledge. They were undoubtedly considerably depreciated. I do not remember what their value was.

I say, suppose your honor should be of opinion that to make a decree now would be a hardship, then we have to state this, which I submit is quite a sufficient answer for this difficulty. As I have said, the day before this option expired Mr. Willard found himself in the presence of this difficulty concerning Treasury notes, that Mr. Tayloe would not receive them. Mr. Tayloe had left the city temporarily. He filed his bill on the 29th of April. He stated the question which had arisen between them and offered to do whatever his contract required him in equity and good conscience to do, and asked for a specific performance. In other words, he placed himself speedily, promptly, and fairly before a court of equity and said: "I want this property on the terms on which Mr. Tayloe has agreed to convey it to me, and if I ought to pay something else than Treasury notes—if I ought to do this, that, or anything—I am ready to do anything the Court requires." Now, I submit this is all he could do, and all that was required. It certainly shows no want of good faith on the part of Mr. Willard, in the first instance, that he should offer Mr. Tayloe, for the payment of this stipulation, some of that currency which all the rest of the community were using, which the Government was paying and receiving, and which every State Court before whom this

question has come has finally decided to be a legal tender. There was no want of good faith which could be imputed to him for making such a tender. In the first place, ascertaining that this question existed, and desiring to preserve in force his rights, being willing to do whatever equity and good conscience should require, he applies to the Court and makes the offer which I have stated.

In this connection I desire to call the attention of the Court to the case cited in the brief of Chesterman *vs.* Masser, 9 Hare, 206. The case was this: A person having a long lease of an estate—an under lease—giving an option to renew the lease to the lessee, when the time came for the lessee to renew the lease he elected to have it renewed, and the parties differed about the proportions which they should bear of a fine to be paid to the superior landlord—the lessor thinking the lessee ought to pay so much, and the lessee thinking he ought not to pay such a sum. I think, in point of fact, he made no tender. The lessor called upon him to know whether he was going to pay it. He said he was not going to pay that large a sum. He waited for a considerable period—I think about two years—and then filed his bill. In the meantime he had remained in possession under his other lease. The Vice Chancellor before whom the case came dismissed his bill on the ground that he had waited too long before he had filed his bill. He goes on to make these remarks which I submit are very pertinent to this case before the Court. He says:

"It has been very strongly urged by Mr. Selwyn that there was an improper amount of fine charged upon the plaintiff. If he so thought he should have then come into a Court of Equity for the specific performance of the covevant, and put himself in the power of the Court, so as to enable the Court to compel him to pay a reasonable sum. If the plaintiff has the equity which he asserts, and that, without applying to a Court of Equity to assess the amount of the fine, he might hold that equity not only for the three years for which it has been attempted to be held, but, for aught I can see, for twenty years longer, or an indefinite time, by simply saying, 'You have imposed an unreasonable fine upon me; I will not subject myself to the jurisdiction of a

Court of Equity to ascertain the proper amount of the fine I ought to pay, and you have no means of resorting to a Court of Equity.'"

In that case the lessor failed, because he was not in a position to file a bill. Here no such difficulty arose, because the complainant promptly, without delay, came into a Court of Equity to ascertain what was just and proper to have his rights, whatever they might be, enforced. There is no room, therefore, for the imputation of laches on him, so far as I can see, arising out of any part of this contract.

I now wish to advert to a few of the principal grounds which are relied upon in the answer, though I do not find that all of them are relied upon in the Brief. In the first place, the change in the value of the property is relied upon in the answer. It is clearly shown by the authorities referred to in the Brief, that if the contract was fair and not grossly unequal when made, each party took the risk of subsequent events, and hardships arising out of this consequence cannot be regarded. At the time the contract was made, (which was in 1854,) six years before the war, this property appears to have been under $15,000 in value, and was renting for $700 a year. The price at which Mr. Willard was to purchase, if he purchased at all, was $22,500, and the rent which he stipulated to pay was $1,200 a year. Now, there can be no rational account of this difference except assuming it was paid as the price of this option. It was paid to enable Mr. Willard, to whom this property was much more valuable than to anybody else, if he found himself in a condition at any time within the ten years to make the purchase. There is a suggestion in some part of the evidence that the covenant was obtained by some parole assurance that it would never be enforced; but this is not set up in the answer, and I do not perceive that it is relied upon in the bill. Therefore, I pass over it as not being one of the defences relied upon in the case.

I come now to what is the principal defence, and the one upon which the Court below seem to have rested almost exclusively their decree dismissing this bill. Sometime after

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this lease was made to the complainant in this case, it is said in the answer that he assigned to his brother one-half of this lease. After he filed this bill, and after the cause was at issue, I think this brother filed a petition in the Court below, in which he said that his brother conveyed to him one-half the lease, and that he was the owner of one-half of it. The Court do not seem to have taken any action in particular, so far as I can see, for it is not in the record. When Mr. Willard sent a draft of the deeds to Mr. Tayloe, he sent him an ordinary warranty deed of the property to himself, in fee simple, subject to a certain ground rent, as it is named in the lease, payable to a third person, and as to the form of that deed I do not understand that any objection has ever been made. He also sent him a deed of trust to secure the deferred payments, which deed of trust contained a stipulation that Mr. Willard, if he should so elect, might pay off the obligations for deferred payments at earlier dates than those mentioned in the lease.

Now, the Court below dismissed this bill, first, because the brother did not join in the trust deed, and, second, because the deed which was thus sent contained this stipulation not warranted by the contract. First, then, in regard to the brother not joining in the trust deed. It is proved in this case that, by the uniform usage in this community, the party who is to receive a deed is to prepare it and tender it to the other party. That made it the duty of Mr. Willard to prepare or have prepared the deed of conveyance to himself from Mr. Tayloe, and to offer it to Mr. Tayloe. But it was Mr. Tayloe's business to have the deed of trust prepared, and have that executed by Mr. Willard as a concurrent act with the execution of the deed of conveyance. This was the predicament in which these parties stood towards each other. Mr. Willard did, however, have both deeds prepared, and the deed of trust contained the objectionable stipulations to which I have referred. It was returned, however, to Mr. Willard, without any objection being made to its form. It was returned not at all because Mr. Tayloe objected to any stipulation in it, for the parties never got so far as that, but

because Mr. Tayloe exacted gold and would not convey unless gold was paid; and therefore the parties were never at issue on this question of that stipulation in the deed. There never was a suggestion by Mr. Tayloe that he found fault with that or declined to convey because the deed was not properly prepared, and when Mr. Willard filed his bill, as I have said, he offered to do whatever was necessary. Therefore, I submit that, under the law, the respondent could not fall back upon that objection; that the proposed draft of a deed from Mr. Willard contained an objectionable stipulation, when no objection was ever made to it; no issue ever taken on it; no opportunity given Mr. Willard to correct or withdraw it if he found it was not properly drawn, and Mr. Willard himself, by this bill, offers to do everything that it is proper to do. As my colleague suggests, it was merely sent for examination. There was no determination expressed by Mr. Willard that Mr. Tayloe must execute that deed. It was merely submitted for his examination.

Then, as to the brother's joining in the deed, I submit to your honors that is a simple absurdity—without meaning any disrepect to the court below. They did not think it was, but I do. And I submit to your honors if it was not. Why, these were to be concurrent acts. All that Mr. Tayloe had to do was to see that he got by the trust deed a good title to the property to secure the payments. Mr. Willard, this complainant, asked Mr. Tayloe to convey it to him solely; and if he had conveyed to him solely, and Mr. Willard conveyed back to Mr. Tayloe, the latter would have had perfect security. Mr. Tayloe, as your honors will see by looking at the contract, had nothing to do with any arrangement between Mr. Willard and his brother. Whether the brother had this title, which he asserts in his petition he had, did not appear by proof in this case; and I submit there is no legal evidence in this case that the brother had any such title. But if he had, if he was the equitable owner of one-half of this option, still if he did not come forward and claim under it, and the other equitable owner with whom the contract was made, did come forward and claim under it, then it was

Mr. Tayloe's duty to have conveyed to Mr. Willard and taken from him a deed of trust with every guarantee which would have secured his payments. This is also a matter which does not appear ever to have been mooted between the parties themselves. There were no reasons given at the time for not complying with the conditions of the contract, or which had any actual influence on the contract. Therefore, I submit that for the Court to refuse to enforce performance of the contract, because the brother did not join in that trust deed is raising out of a mere shadow a good objection to this otherwise tenable deed. I have placed upon the brief a collection of authorities, the most important of which is Tasker *vs.* Small, in 3 Mylne and Craig, from which I will read a single extract:

"It is not disputed that, generally, to a bill for a specific performance of a contract of sale, the parties to the contract only are the proper parties; and where the ground of the jurisdiction of courts of equity in suits of that kind is considered, it could not properly be otherwise. The Court assumes jurisdiction in such cases, because a court of law, giving damages only for the non-performance of the contract, in many cases does not affort an adequate remedy. But in equity, as well as at law, the contract constitutes the right, and regulates the liabilities of the parties; and the object of both proceedings is to place the party complaining as nearly as possible in the same situation as the defendant had agreed that he should be placed in. It is obvious that persons, strangers to the contract, and, therefore, neither entitled to the right, nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for the breach of it."

That is applicable, I submit, not merely to a suit in Court, but to those necessary proceedings which lay the foundation for a suit. Mr. Tayloe was under no obligation to recognize the brother of Mr. Willard as an essential party to this contract. He was no party to this contract; had nothing to do with the equities between those parties; and if the brother had come to him and offered to carry out the purchase it would have been a complete answer to say: "I do not know you;

I made a contract with your brother, and I am ready to keep it with him; but I do not know you in the contract." It is otherwise, or it may be otherwise, where the entire contract has heen assigned. If the promisee of a contract to convey real estate assigns to a third person so as to part with all of his interest in it, and substitutes that third person in his place to all intents and purposes, there are some authorities going to show that that third person may file a bill and insist on the performance of the contract and insist on being received by the vendor as representing the vendee. I say there are some authorities, but they conflict even on that point; but there is no authority that affords a pretence for the position that where an equitable interest in a part of a contract has been acquired that the vendor is under any obligation to recognize any such equity as that the owner of it has any right to interpose in any manner. I submit, therefore, that the grounds on which the Court below dismissed this bill are wholly untenable.

ARGUMENT OF MR. POLAND.

Mr. POLAND. *May it please your Honors.* Various objections have been made to the right of this honorable Court to decree a specific performance of contract by the defendant in this suit. All the objections that were substantial enough to be thought of any consequence by as good a lawyer as my associate, Mr. Curtis, were well answered by him. Several others, so refined as not to have occurred to him in the case, have been suggested by the counsel on the other side, and those I shall endeavor to answer.

I think I may be allowed to say that I have never in the course of my professional experience seen a case in a court of equity handled with so much technical sharpness as this has been by my learned friends on the other side. The contract of the defendant, of which we seek specific performance in this suit, was contained in a lease. Gentlemen on the other side seem to treat it as if this contract was a part of the lease; as though it was in some way affected by the lease because it was contained in the lease. In my judgment the case is not at all affected by the fact that there was a lease, and that the contract was contained in it. The contract would have been precisely the same, and the legal rights and equitable rights of the parties to it would have been precisely the same, if this contract clause in the lease had been in a contract by itself, and there had been no lease whatever. The rights of the parties would have been precisely the same if that contract had been in writing merely, without being under seal; they would have been precisely the same if there had been nothing in the nature of a contract, but it had been merely in the shape of a contract. Therefore, all this learning which my friends on the other side have indulged in rela-

tion to covenants *running with the land;* in relation to what is an assignment of a lease, and when it is a mere under lease, all goes for nothing.

I shall take up the case in a little different order from that pursued by the gentleman on the other side. Now, as is said in our brief,—and that is only a quotation from Judge Story—and Judge Story's is but a quotation from the decisions of a great many cases—that in an ordinary case of a contract for the sale of real estate, it is a matter of course that a specific performance is decreed; it is always taken for granted that where a party makes a contract for the purchase of a particular piece of real estate, it being fixed as to locality, he has some special and peculiar object in view, and reason for making that purchase. Therefore, unless some equitable or legal reason is shown to the contrary, it is as much a matter of course to decree a specific performance of that contract, as it would be to give damages in a suit at law for a breach of it; that it rests always with the other side to show some absolute legal or equitable reason why the contract should not be specifically performed. The question is whether any of the reasons that have been urged here are sufficient, valid reasons why this Court should not say the orator should have a decree of specific performance.

I desire to call your honors' attention for a moment to the facts in this case. The counsel on the other side have conceded now, in their brief and in their arguments, that before the expiration of this ten years, the orator, Mr. Willard, went to the defendant, Mr. Tayloe, and offered to pay him the $2,000 in United States notes; what are ordinarily termed "legal tenders." Now, if your honors will look into the testimony of Mr. Tayloe, you will see that when he was put on the stand, he distinctly and absolutely denied it, he swore it was not so; swore even that Mr. Willard never sent him this check for the $2,000; and it was only when he was confronted with his own letter in which he returned the check, and the letter in which he returned the deeds sent to him, that he admitted this was so. Yet Mr. Tayloe, (who is a man I never saw,) is, I understand, an old gentleman who

makes very high pretensions to respectability. And, if your honors will look into his testimony, you will see, at least, a very uncandid if not very untruthful—

Mr. McPherson. Allow me to interrupt you a moment. The money was not *produced* by Mr. Willard; and when Mr. Tayloe was asked if the money was *tendered* to him, he simply said it was not. It is generally held that to make a tender, the party making it must himself produce the money.

Mr. Poland. I am entitled to say nothing in reference to Mr. Tayloe except what appears on the record. So far as this shows anything in reference to Mr. Tayloe, I have a right to speak of him. I say your honors, on reading his testimony, cannot fail to come to the conclusion that in his testimony he was, at least, very uncandid, if not very untruthful; and I say further, yours honors can come to no other conclusion, than that he intended to shuffle this thing by, to put off Mr. Willard on one pretence and another until after the first of May, so that the latter should lose the benefit and advantage of this contract. I know that he says he went away before the first day of May in consequence of the illness of his son somewhere at the north, and I have no evidence to the contrary; therefore I have no right to say that it is not true; but if you will look at the record and see his replies, you cannot fail to be satisfied of what I say. In the first place, Mr. Willard, an ordinary business man, sat down and made a check on a bank. That is the ordinary way in which business is done between business men. Mr. Willard was a man of ample responsibility. And in order to be in due time, on the 15th of April, fifteen days before the contract expired, he sat down and drew a check for $2,000 and presented it to Mr. Tayloe, saying that he presented it for the purpose of paying the $2,000 on the Mansion House property before the time ran out. So about the preparation of the deed and deed of trust. He prepared these between this and the 1st of May. On that same day he sent this check to Mr. Tayloe, who returned it with this note:

"Dear Sir—Mrs. Tayloe is waiting for me to go out with her; I have no time now to look into the business, and

return the check enclosed. I wish to see you for explanations before closing the matter.

"We are sorry not to have had a visit yet from your amiable wife," &c.

No objection at all that this $2,000 was in a check. Before the 23d of April, it seems, Mr. Willard had procured some deeds to be drawn, a deed for Mr. Tayloe to execute to him, and a deed of trust to be given by him to Mr. Tayloe to secure the deferred payments. I may as well explain here that I agree entirely that this deed of trust was not one that Mr. Tayloe was bound to receive; that there was a variation between the terms of this contract of sale and the terms of this deed of trust that Mr. Tayloe was not obliged to receive, and which Mr. Willard could not have compelled him to receive. But Mr. Willard had them prepared, as he supposed, to the satisfaction of Mr. Tayloe. He says, in a previous transaction between them, it was agreed the deeds should be drawn so that the payments might be anticipated, and they were drawn in that manner for that reason, and sent in a letter to Mr. Tayloe for him to examine, to see whether the papers were satisfactory to him—not done in a manner that was intended or calculated, or which could have had the effect to have deceived Mr. Tayloe, or have procured him to receive a deed of trust different from what he was entitled to receive. They were sent to him severel days before the time expired, for the very purpose of giving him ample opportunity to examine them and see whether he was satisfied with them. He returns them in a letter dated the 23d day of April, and says:

"My confidence in you at the time of the signing of that lease, in taking your interpretation of the paper, you assuring me that the sale clause was very important, and should go for nothing if I wished it, and that I was at liberty to sell if I could 'get a better price,' induced me to sign the lease, to which you know I had objected, because of your having introduced that sale clause without my knowledge or consent; but, as I had signed the paper, I should have carried the matter out if you had proffered me the amount which you know you had offered for the property.

"The papers sent me yesterday are herewith returned."

Here is the part of the letter I desire in this connection to call your honors' attention to:

"So unwell at this time as to be indisposed to give attention to my business; seeking quiet and repose, and depricating all kinds of controversy, I hope to avoid every feeling of unkindness; never having wronged or injured you in any way, and certainly not in regard to the Mansion House, I also hope you will see the propriety of having regard to my rights and feelings, as well as to my welfare.

"Yours, truly,

[Signed] "BENJ. OGLE TAYLOE."

Well, after Mr. Willard had gone himself and offered Mr. Tayloe the money and he had refused to accept it because he claimed he was entitled to have gold; after he had sent these papers to him for examination, and he had returned them without making any objection whatever to them on account of form, then, in order to have somebody who would be a witness, Mr. Willard sent a man to Mr. Tayloe with the money and with the papers. He was told that Mr. Tayloe was not at home; that he was out riding. Mr. Willard sent him a second time, and getting the same answer, he sent still another man, and he meeting with no better success, Mr. Willard was outdone. From the history of this matter, the Court can come to no other conclusion than that Mr. Tayloe intended to keep this matter open until after the first of May, so as to evade Mr. Willard's having the advantage of this contract; to prevent him in some way from offering such a performance on his part as would have entitled him to call upon Mr. Tayloe to fulfil the contract on his part. So that, I say, Mr. Tayloe does not stand precisely in the condition to come into this court and ask all these equitable considerations and favors to himself that have been urged by his counsel. They now concede that even within the time which Mr. Willard had, by virtue of this contract, to tender performance, he went and offered to pay in United States notes, which, by act of Congress, are made a legal tender for all debts, public and private, offered the $2,000 to Mr. Tayloe; that he refused to receive it on the ground that he was entitled to have gold. But, of course, that prevented the

fulfilment of the contract; because the very first act to be done in order to fulfil this contract, was for Mr. Willard to offer the money to Mr. Tayloe, and for him to receive it. And when they had come to an agreement that would be performed in relation to the payment of the money—then was the time to consider in reference to the forms of the conveyances to be agreed on. Within the time—several days before the time expired—Mr. Willard had these deeds drawn and sent them to Mr. Tayloe, so he could sit down in the quiet of his own house and examine them, and if he found any objection to them could make it and return them to Mr. Willard. He did return them without making any objection whatever to the form of these conveyances; that is all conceded. Now gentlemen come here and stand on this technical objection to the form of these papers.

In the first place, in relation to the money Mr. Willard offered: They say it was not money. We offered United States Treasury notes. They say it is not money to pay any debt, and if it is, this is not a debt.

Now I do not propose at all to go into the discussion of this interminable question about the constitutionality of that act of Congress in relation to making United States notes a tender for debts. I say the question is settled. It is not open to be argued. It is not only settled by judicial decision in almost every State in the Union—solemn decisions of the highest tribunals in almost all the States of the North that have had any Courts who could try this question; but it seems to me to have been incidentally settled by this Court in a case decided by this Court a year ago—that of Riggs vs. Thompson. I am aware the Court said the exceptions in that case did not bring that question distinctly and squarely before the Court; but I must confess, after reading the decision in that case, if I should read another where this Court had decided, that Treasury notes were not legal money, I should think you had made Thompson and Riggs' a very odd-looking case. If the Court desire to go into this question and examine the decisions of other Courts in reference to it, in some of the cases on our brief, and especially the

cases of New York, California, and Indiana, are most exhaustive and exhaustless reviews of the whole subject. In some other decisions the Courts have contented themselves by saying that the question is settled; that it is not open for discussion. That was the substance of the decision reported in my own State in a case which was a very strong one. The banking law in the State of Vermont provides that the banks shall redeem their bills on presentation at the counter in gold and silver coin. A quantity of bills were presented at the counter of one of our banks since this act of Congress was passed, and gold and silver demanded, which the bank refused to pay, but did offer to pay in United States Treasury notes. Suit was brought against the bank. They contested the constitutionality of the act of Congress, and claimed if it was constitutional, in consequence of this provision of the banking law of Vermont, making it the duty of the banks to redeem in gold and silver coin, they were not bound to receive Treasury notes as a legal tender, as in the case of ordinary debts. But all those points were over-ruled in that Court, and it was held, even in that case, in favor of the banks; that the United States Treasury notes were made, by act of Congress, a legal tender, and were a legal tender. But I say, in addition to the decisions on this subject, that this is a question that has been settled by events and by transactions. Now for five years the entire commercial business of this country has stood on the basis of these notes being lawful money, and the question cannot be determined, cannot be decided, that the whole business of the country during all this time—all the transactions of men for the last five years in many matters—have been based upon an illegal and unconstitutional kind of money. It would uproot everything. I say the Court may just as well go back and decide that the purchase of the territory of Louisiana was without the Constitution, and that it does not belong to the United States, with just about as much propriety as to go behind the transactions of the last five years and determine that everything in the way of commerce and business in this country has been done on a false bottom. Without taking

any more time on this subject, I treat that as a settled question—a thing that is not to be, and cannot be, disturbed.

But, they say, if these United States notes are money to pay an ordinary debt with, this is not a debt; it was a mere performance of a condition. Well, now, what does the term "debt" mean? When the act of Congress makes them lawful money for payment of all debts, public and private, what is the scope of that term? Why, I say that it includes everything, every kind of obligation for the payment of money from one man to another, every contract, express or implied, wherever, by any kind of stipulation, a sum of money is to be paid by one man to another. That is a debt within the meaning of the act of Congress. But, they say, this was optional, was not a debt; that there was no need to pay it at all unless he chose. It is true the contract only bound one man until it was accepted by the other; but that is pretty much the case, your honors, with all contracts; that an offer on one side, until it has been accepted by the other, is not binding; and when it is accepted it is binding. It happened here that there was a long period of time that might elapse between the offer of one and the acceptance of the other. In some cases on this subject, it is called a continuing offer; in some other cases they are termed unilateral contracts. But when this offer has been accepted by the other side, then it becomes a completed and perfected contract. There is then a right of action on the other side; it is no longer unilateral, no longer a one-sided contract. It is a contract with two sides—a perfected, absolute contract. And if Mr. Willard had signified his acceptance of this option, in writing, a bill might have been maintained by Mr. Tayloe against him for a specific performance of the contract, it having become binding and absolute; and this sum of $2,000, and the whole sum he was to pay would have become a binding debt. It was an obligation he was bound to perform; and therefore all this reasoning of the gentleman in relation to its being a mere condition he might perform or not, as he chose, all goes for nothing.

And here, your honors, I may notice what was quite vaguely

hinted at in the defendant's brief, and hardly alluded to by the counsel in opening; but my learned brother who lastly argued for the defendant has made his principal point out of it, and that is, that by what has taken place, suppose the United States Treasury notes were a legal tender for the purpose of fulfiling such obligations as were upon the orator here, then, they say, this is not the kind of money we had a right to suppose in 1854 we should receive. It is a kind of money that in proportion to the property itself is not so valuable as the money in use and lawful in 1854, and, therefore, the contract has become inequitable, and therefore the Court should not decree a specific performance. I may as well consider that, and what kind of an inequality in contract it is that will justify a Court in refusing to decree a specific performance. And I say, first, upon this subject, the authorities are clear that inequality—anything inequitable in the contract that would justify the Court in withholding a decree for a specific performance—must be something that exists *when the contract is made;* something that inheres in the contract itself; something that made the contract inequitable at the time; that if a party takes it upon him to make a contract that is to last for ten years, he runs his risk in relation to the changes in value of property. And especially where the party makes a contract in relation to the conveyance of a piece of real estate in a city, he must, of course, know it is subject to very great change. Property so located may immensely rise in value or greatly diminish in value during the time. Now, was there anything inequitable in this contract at the time it was made. Mr. Willard swears that this property in 1854, when this contract was made, was worth less than $15,000. It was then only leased at a rent of $700 per annum. Mr. Tayloe himself does not deny in his testimony—there is not a particle of testimony in the case tending to contradict—what is said by Mr. Willard on this subject, that $15,000 was more than the fair value of these premises in 1854, when this contract was made. The parties evidently contemplated that the property might increase during the next ten years. Mr. Tayloe was not willing to enter into an obligation, that at

any time in ten years he would sell without putting the price as high as $22,500. You will remember Mr. Willard and his brother, who were then young men, had just contracted an immense debt; had a great load on themselves by having only the year before this purchased the Willard Hotel and given a mortgage for almost the entire amount of the purchase money. Mr. Willard was not in a condition to purchase at that time. Although he might have purchased at $15,000, he was obliged to say he would take ten years in which to do it, and pay $7,500 more in order to get that time and have the option during that ten years. Well, now, when a man takes it upon himself, and the contract is all open and fair, and he is willing to take the risk of a venture to run through ten years, and it happens to go wrong, is he to come into Court and say, "Things turned out differently from I thought they would. A great many things happened I did not think of beforehand, and it has rendered my contract inequitable, and therefore I ask to be excused from performing it." Was any such doctrine as this ever heard in a Court of equity before this? Now, I see all the authorities on this subject say that in order to enable the Court to say they will not decree a specific performance because it is unjust or inequitable it must be an injustice or inequality that subsisted in the contract when made. I have a little note here that I have copied from Sugden on vendors, and whatever I copy from Sugden I consider about as good as a judicial decision. It is 1 Sugden, 365:

"But a purchaser will be compelled to complete his contract, although by the calamities of the times between the contract and the conveyance estates generally are reduced several years' purchase in value, for that ought not to rescind the contract."

On page 274 of the same I find this:

"The decreeing a specific performance is a matter of discretion, but it is not an arbitrary, capricious discretion; it must be regulated upon grounds that will make it judicial, *and the period at which the Court is to examine the agreement between the parties is the time when they contracted.*"

There are a large number of cases in the printed brief, and I

think Judge Curtis in his opening argument referred to them. I say that is the settled doctrine on the subject, and I have never met a case or heard of a case which undertook to decide the contrary, until my brother undertook to bring in this Maryland case, where a man made a purchase of land and was to pay Continental money, which became utterly valueless. And there is a very short note—not an opinion but a kind of rescript or mandate which seems to have been drawn by the chancellor in that case, in which he set forth that being payable in Continental money, he did not think the contract ought to be enforced. But I have noticed that the defendant set up in his answer that he was deceived and defrauded in making that purchase; that he lived where he had not the means of knowing the value of Continental money, and that the orator in the case in making the contract defrauded and deceived him by false representations in relation to the value of Continental money. How far that entered into Chancellor Hanson's judgment in the decision of that case, I do not know.

Mr. McPherson. He distinguishes between the two.

Mr. Poland. I say the entire current of authorities,—and the entire reason is in favor of what the books say on this subject—all the decisions are that contracts must be judged by the time they are made; and, if a man will take it on him to make a contract to run through a series of years,—exercise his judgment in relation to what the influence of these years will be, what the tendencies of the times will be, what the state of things at a given time will be—and what the probable value of real estate will be at a future day, it does not lie in his mouth to say "They have turned out different from what I expected, and, therefore, I ask to be released from my performance of the contract." It would be an end to all contracts of this sort, if a man was allowed to shuffle and excuse himself from performing his contract in consequence of what may happen between the time he makes the contract and the time he is called upon to fulfil it. Not only are reason and the decisions upon this subject all one way, but all in favor of the position I maintain.

And here I desire to say a few words in relation to the point which is made by my brother, Mr. Curtis. Suppose this Court should say that United States notes are not lawful money for the payment of any debt; that a man could not be compelled to receive it; or suppose this Court should say this is a case where we had no right to pay this; that it was not a lawful tender in this case; that there may be a species of obligation a man cannot fulfil lawfully; or suppose the Court should adopt the theory of the other side, and say that in consequence of this change that had taken place between 1854 and 1864, by which United States Treasury notes had legally taken the place of gold and silver, the contract had become inequitable, so that the orator ought not to require the defendant to perform it unless paid in gold; we say we have submitted ourselves to the Court on that subject; we have done all that we were bound to and have a right to call upon the Court to say we may fulfil our contract in that way, provided the Court say that is an obligation that rests upon us. This is not a case where the defendant was negligent. The gentlemen on the other side do not say but what he came up to all the requirements of the decisions and the books in relation to specific performance. He was prompt enough, and eager enough, and anxious enough to fulfil his contract. If there was anything wherein he failed it was in not being wiser than the National Legislature, and wiser than all the State Courts upon this subject; that although they have said this was such money as he might tender; although all the business of the country was being done upon that very basis, they say he should have been wiser than that, and should have known he had no right to pay that kind of money. He went with what he supposed to be lawful money, and within the time, and offered to complete his contract. The other party says: "I am not bound to receive this, and I will not take it." Immediately Mr. Willard, the complainant, brought his bill. The bill was filed on the 29th of April, a day or two before the time expired. He comes into Court and tells what he has done, claims that was what the law required, and all that the law required of

him ; " but," he says, "if there is anything more, I submit myself, upon the facts I state in my bill, to fulfil the performance, whatever the Court shall decree in the premises;" that provided we are wrong in relation to all these previous points, we have a right to come in and ask the interposition and judgment of the Court in our favor, even if the Court should say for any of these reasons we were bound to pay gold. The case read from 3 Mylne & Craig, by my associate, is a complete authority upon that point. The cases on that subject are, I believe, all cited in the brief.

The only difference that could be made if the Court should say that the money that he offered with this doubt—and I take it there cannot be any question that he had the right at least to be said to have an honest doubt—whether this was not the kind of money we might tender—if the Court should solve that doubt against us, still they would be bound to say that Mr. Willard acted in perfect good faith, and did all that he supposed he ought ; all that his counsel advised him ; all that Congress had said ; all that the State Courts had said was necessary for him to do ; or, at least, that he was acting in perfect good faith, and had a right to appeal to the Court to determine this question between him and his adversary ; and he comes into court upon that ground.

Now, we think, upon any principles on which Courts of Equity have ever acted in deciding any class of cases, he is not to be turned out of Court. Now, perhaps, the Courts have gone further in this kind of case—bills for specific performance—and have waived more technical objections than in any other class of cases. It is on the principle that where a man has made a contract for the purchase of real estate, he has some special and particular object in view, and therefore, if the contract can be substantially performed, no matter how many technical variation there may be in point of time, although there may be a failure on either side, still, if the contract can be substantially carried out, so that the parties can have, substantially, what they expected when they entered into the contract, they will carry it out by a

decree, although there may be technical variations, and these they are not able to fulfil on one side or the other. The Courts have gone very far—some of the cases very much father than would seem to be consistent—and some of the cases on this subject have been questioned as having gone too far. One, I remember, where a man purchased a piece of land, upon which there was a wharf, but the title failed as to the portion of it embracing a wharf. It turned out that the wharf was the chief consideration with the purchaser. Still he was compelled to take the land without the wharf. I should hesitate, myself, to ask the Court to go so far as that. But every variety of objection has been overcome. The case that was referred to in 2 Edwards seems to have been carried up and tried before the Chancellor, and reported in one of the volumes of Paige. Ordinarily, Courts of equity have said time is not material in contracts; and in some cases they have gone so far as to say parties could not make the time material. In that case, the Court decided the parties had the power to make the contract in such a way as to make the time material, and in that case they did. That was all there was of that decision. The language of the contract was exceedingly express and sharp; and the Court said they had fixed a day and made that material, and the Court could not get over it.

This is a case where we were not bound to make any technical tender. It was not like the case of the tender of the debt where the man had to hand over his money to fulfil his obligation. Here in this agreement between these parties was something to be done on both sides. We were not bound to pay our money unless we got our deed. He was not bound to give the deed unless he got the money. Here were concurrent acts to be performed at the same time. The law is perfectly well settled on that subject that when there are concurrent acts to be done by two in relation to the same agreement, all that is necessary for either party to do is to go and show his readiness by offering to perform; so that in a case of this sort it was not necessary for us to make a technical tender within the meaning of the law, as you would

in order to bar an action for the recovery of a debt. It was enough, all that the law required of Mr. Willard, that he should go and make the *bona fide* offer to perform the contract on his part and call for its execution on the other—that is, the deed.

I come now to this objection about the deed of trust. As it is said in our brief, this is a question the parties never differed about. They never got to it. The very first thing for them to agree or disagree about, was in relation to the money. Mr. Willard sent these United States notes and offered them to Mr. Tayloe. He says: "I will not take them; I must have gold." Now, the gentlemen say, "The deed of trust that you produced was not in accordance with the agreement; it gave you the right to anticipate the deferred payments; and we were not bound to take such a deed of trust." I entirely agree you were not bound to accept it. It was not necessary for Mr. Willard to have produced any deed at all. If he went there and offered to pay the money, and Mr. Tayloe refused to accept the money and said he would not perform the contract unless paid gold, it was not necessary for Mr. Willard to go and get deeds drawn. It was a work of supererogation entirely. But suppose it had been Mr. Willard's duty to get the deeds drawn,—and there is considerable diversity of opinion among the lawyers in the Court below, as shown by the record touching this point. One lawyer swears it was the duty of one party, and another swears it was the duty of the other party, to prepare the deeds. The ordinary, common-sense rule on the subject, I suppose, is that the party whose duty it is to give a paper, is to get it made. I take it that is the common-sense rule everywhere. Where it was Mr. Willard's duty to give a deed, he must get somebody to make it, and where it was Mr. Tayloe's business to give a deed, he must have it prepared. That would be the rule of common-sense, and I take it would be the rule of law on that subject. But whosoever's duty it was to prepare the deeds (and gentlemen can have it which way they please) the parties had disagreed in relation to a thing that preceded the

execution of the deeds, so that no deeds need have been produced. But Mr. Willard took it upon himself to go and get some lawyer to make out a deed of conveyance and deed of trust; and I quite agree that the deed of trust was drawn in such a manner that Mr. Tayloe was not bound to receive it. But what did Mr. Willard? He sits down and encloses these to Mr. Tayloe that he might examine them and see whether he was satisfied with them. There is not a particle of evidence that Mr. Tayloe ever read it; probably he never did. He sends the deeds back to Mr. Willard without any sort of objection; without saying "I am not satisfied with the form of these deeds," but sends them back leaving Mr. Willard to believe that so far as the form of the deed was concerned, Mr. Tayloe was entirely satisfied; that all he wanted was to be paid gold.

Now the gentlemen come in here and say "why, the condition of this deed of trust was not in strict conformity with the contract of sale. We had a right to object, and we make our objection now. After allowing you to go on, letting the time run out, resting upon what had been done, we will come in afterwards, and raise this technical objection." And my brother, who last argued on the other side, has discovered another difficulty. He says the other deed was wrong. It rested in this last moment for that to be discovered. He says the description of the premises is different from that in the contract of sale. He does not seem to know it, but really there may be two modes of describing the same thing. There ought to be some proof that the descriptions do not cover the same property. Can we be cheated out of our right to have this contract performed without some affirmative proof on that subject? And, moreover, he raises some objection to the form of it because the whole thing was subject to a ground rent to somebody else. I apprehend a Court of equity are never going to turn a case over on any such thing as this. If there was any objection to the form of those papers; if the parties had got to that; and when they were submitted to Mr. Tayloe for examination, if he was going to rest his refusal to carry out the contract on the ground that the papers

were not drawn right, he ought to have sent them back to Mr. Willard and informed him of his objection. But when he comes into Court at the last moment and says, "There is a technical difficulty about these papers, and that was the reason I refused to execute them," we say it was his duty to have made the objection at the time. The doctrine by which Courts of equity are governed is perfectly familiar in regard to this, and it is that if a party wants to stand on any objections of that kind, he must make them at the time.

And this brings me, your honors, to the ground upon which the defendant's counsel have mainly rested their defence; and that is this alleged conveyance from the orator, Joseph C. Willard to Henry A. Willard. They say that it appears in this case that the former made a conveyance which operated as an assignment of one-half of that lease, and also as an assignment of one-half of his contract to purchase.

Well, in the first place, we say there is no legal proof in this case that there ever was any such paper executed. The defendant in his answer to our bill sets up that at such a time there was such a conveyance of this sort, and recites it, sets it out at length in his answer. We have traversed his answer, everything there is in it. I take it, it cannot be said—my brothers on the other side will not say—the defendant's answer in this respect was responsive to our bill, so that the answer would become any evidence for the defendant; and if this conveyance became material to the case, the burden of proof was on the defendant to show it. In the progress of this case, after it had been in the court of the District, here, some time, Henry A. Willard came in and filed his petition to be made a party orator, and in his petition he recited that same conveyance, (or pretended conveyance,) at length; and to that copy in the petition is appended what purports to be a ceitificate of the Register of Deeds of the District, that it was a copy of the record. It does not appear from the record the Court ever took any notice of that petition at all. Nothing is said in the record whether they allowed him to be a party or refused to allow him to become a

party. No disposition was made of it as it appears. The case went on between the orator, Mr. Willard, and the defendant, Mr. Tayloe, and proceeded to a final decree, which dismissed our bill. Is Henry A. Willard's petition any evidence against us? Any evidence against anybody? He came in *sua sponte;* was not brought in by the orator or by the defendant. came in and volunteered to be a party to the case; but the Court did not allow him to become one. Was his petition any evidence against either of them? By no means. But, says the gentleman: "We have a copy of this conveyance, certified by the Register of Deeds of the District." There is not any such thing in the case. Henry A. Willard has recited, as a part of his petition—he has set out in his petition—that there was such a conveyance, what purports to be a copy of the conveyance, and a copy of the Register's certificate that that is a true copy of the record. But it is a mere recital. There is no copy of the paper certified by the Register of Deeds filed in the case, as evidence, either before the master or at the hearing, or at any time. It is merely set out and recited by them in the defendant's answer, and in this petition of Henry A. Willard. Now, I have not examined to see whether, by law, the Register of Deeds in this city can certify copies of records from his office. I suppose he can. Throughout New England we have a Registry system either by counties or towns. In my own State (Vermont) deeds are recorded by the clerks of the various townships, (we call them towns;) and our statute makes a copy of the record certified by the clerk legal testimony. In some of the other New England States the system of recording deeds is by counties. They have statutes making copies certified by their county clerks legal evidence. I have not examined the laws in relation to this District to see whether a copy certified by the Register of Deeds is legal testimony or not. I am willing to concede that it does; but the difficulty is that there is not any copy in this case certified by the Register of Deeds. Henry A. Willard, in his petition that he has filed, sets out that there is such a thing; but it is merely Henry A. Willard's statement that there is

a copy of such a conveyance recorded and certified by the Register. The gentleman mistakes altogether in saying that there is any such paper filed in this case. It is a part of Henry A. Willard's petition.

Mr. McPherson. He filed a copy, sir, separately.

Mr. Poland. He says, in his petition, he files a copy, so and so; but he has not filed it. That is the difficulty with the gentleman's case. He said he would file a copy and did not. It is only this recital—that is all there is to show. Well, now, we submit, there is no legal evidence whatever of the existence of any such deed. The gentleman says, that the orator, Joseph C. Willard, filed a letter from Henry A. Willard, in which he said he would deed back the Mansion House to him. It is a very novel species of evidence to prove the existence and contents of a deed. So we say, all these questions growing out of this alleged conveyance to Henry A. Willard go for nothing, because there is no legal testimony in this case that there was any such conveyance. But, suppose there was. Suppose it to be proved that there is just such a writing executed by Joseph C. Willard to Henry A. Willard, as they have set out in their answer, as is recited by Henry A. Willard in his petition. We say, that so far as the defendant, Mr. Tayloe, is concerned, that is a matter entirely *inter alios*. If Mr. Tayloe contracted to sell that land to Joseph C. Willard, and if Joseph C. Willard had made a contract with somebody else that he would sell half of it to that person, or has made an assignment of half the contract, it is a matter with which Mr. Tayloe has nothing to do.

And here, my brother who first argued for the defendant, has indulged in a great deal of learning about covenants running with the land, and insists that this is a case of covenant running with the land. What is meant by covenants running with the land? Wherever a man conveys land, and covenants for the protection of the title, those covenants are considered as part of the conveyance itself. They attach to the land in the hands of the purchaser. They are the muniments and guards of his title; so that whenever he conveys

the land, or the land passes in any way from him to another, although there may be no covenants, although it may be by operation of law, these pass with it. In the Massachusetts case, which the gentlemen on the other side have on their brief, where the land was sold at sheriff's sale, it was held that the purchaser became entitled to the benefits of the covenants in the deed to the debtor. They pass with the land as its guards and muniments; and it is necessary, in order that "the covenants run with the land," that the land should go. The gentlemen forget that, in order that the covenants run with the land, it was necessary the land should pass.

Now, as I said before, this contract between Mr. Tayloe and Mr. Willard is precisely the same as it would have been if the property had not been leased at all. It would have been simply a contract to sell to him this land in ten years. And if the contract had not been under seal it would have had precisely the same legal validity. The form of action might have been different, but his legal obligation would have been precisely the same. Did any land pass to Joseph C. Willard by virtue of that contract? None at all. But did any land pass when he executed this contract (or deed, if you choose to call it so,) to Joseph C. Willard—he owned nothing in the premises. Whether Mr. Tayloe's contract to convey to him was valid or not, it had not been fulfilled; the title still remained in Mr. Tayloe. It was an argument to sell to him; and then, if there is such a paper proved to have been executed by Joseph C. Willaed to Henry A. Willard, that is a contract between those two, that Joseph will let Henry have half of it, and may be a binding contract. We do not undertake to deny that. But we say that it is entirely *inter alios*, and entirely unaffected by all the decisions these gentlemen have read about covenants running with the land; that where one party makes a contract he will sell land, there is no covenant that runs with the land. The assignee of the contract may enforce it perhaps, but it is not at all on the ground of this covenant running with the land. And this case the gentleman cited, Roe *vs.* Hawley,

12 East, does not involve any such question, or stand on any such ground. It was a mere question on the phraseology of a particular deed. The term was leased to a man, "his executors and administrators," so many years; and during the time the man died, and the land went to a devisee. The question was, whether he came within that description of representatives—a mere question of description. The Court said he did.

The next case that was cited was from 1 Paige—the case of Van Horne *vs.* Crain. I happen to have a memorandum of that decision. It was like a good many other cases that are in the books, not a very clear and distinct case, and wanted a little study to ascertain precisely what the case was. But I have it here. The land was leased to two persons for life, with a clause in the lease that the lessors would convey to the lessees or their assigns at any time during the lease on the payment of $15 per acre. One half of the lease was assigned to the orator, and the other half, by several conveyances and assignments, to the defendant. The defendant paid for the land the $15 per acre, and took a conveyance to himself. The bill was for a partition and account, and general relief. The Court decreed an account, and that the defendant should convey one half the revision to the orator, on being paid one half the purchase money that he paid.

If a decree should be made to the orator here, that Tayloe should convey to him, and afterwards Henry A. Willard should bring suit against him, or set up a claim to have the benefit of one half of that conveyance, the Court will say: "If that is a valid agreement, there is no reason why that contract should not be fulfilled," and they would decree he should convey one half the property to Henry. But it does not involve this question of the covenant running with the land at all.

The gentlemen argue—and that seems to have been the ground on which this case was decided in the District Court, that the plaintiff had sold half his option to Henry, and, that therefore, he could not exercise it without concurrence with

Henry ; Henry must join him ; Henry must be the owner of half the money tendered ; and Henry must join him in asking for a conveyance. Well, now, if the contract had given the option to the two instead of the one, that might be true ; but I apprehend it is entirely clear that one of them, in the absence of the other, even in that case, could have gone and tendered the money, and demanded a conveyance. But if there is any objection whatever growing out of this, it is out of the fact that Joseph demanded the deed to be given to himself. The only objection Mr. Tayloe could make in reference to that would be, that if he deeded to Joseph C. Willard, and Mr. Willard gave him a deed of trust or a mortgage on the premises, the conveyance by Joseph to Henry might affect Mr. Tayloe's holding the whole property as security for the deferred payments of purchase money. But the gentleman does not deny—they make no question on the other side that if Mr. Tayloe had executed the deed to Joseph C. Willard, and he had given to Mr. Tayloe a deed of trust or mortgage for the purpose of securing the remainder of the purchase money on the premises, it would have conveyed to him, and he would have held the entire premises for the security of the payment of the residue of the purchase money.

My brother, who opened this argument on the part of the defendant, undertook to say it would be a mere naked legal title he would hold ; that it would be subject to Henry A. Willard's equitable title. What was it? A title to do anything in these premises until the purchase money was paid? Suppose it to be ; suppose that here was an equitable right in him that everybody was bound to take notice of, and Mr. Tayloe, among the rest, had he an equitable right there that would in any way dispossess Mr. Tayloe or prevent him from holding a lien on these entire premises as security for the payment of the entire purchase money? If my brother has been able to satisfy your honors that there is anything in that objection, he has certainly succeeded in making a better impression on you than on me, for I am not able to see it ; it is altogether too fine and nice for my dull comprehension. Wherever a deed is given and a mortgage given back for the pur-

chase money at the same time, they are regarded as one transaction. I know there is a doctrine that where a man sells land which he does not own with covenants of warrants, and afterwards becomes the owner, that the land enures immediately to the benefit of his grantee in fulfilment of his covenants. But that would not be so, as against a mortgage for the purchase money. If a man sells land and gives covenants of warranty and has no title, and afterwards purchases the land of the true owner and at the same time takes his conveyance and gives a mortgage for the purchase money, it would not inure to the person he had before deeded to, nor would the real owner be cut out of his claim under his mortgage. But that doctrine does not apply to this case, here there were no covenants. So that the present case would be entirely free from the operation of this doctrine about its inuring to the benefit of the grantee by virtue of the covenants, even where there were any. That doctrine rests entirely on the ground that a man who has conveyed land and covenanted that he was the owner of it shall never afterwards set up the plea that he was not the owner against his own covenant.

If there is anything at all growing out of this conveyance to Henry A. Willard, it is an objection that he was not a party. And I desire to consider that question for a moment, whether Henry A. Willard is a necessary party to this bill. All the authorities on this subject I have been able to find are entirely uniform in saying that a bill brought to enforce a specific performance of a contract for the sale of land, is to be brought between those who are parties to the contract, and although some interest either under the purchaser or the seller may have accrued by another contract. The parties in this interest are not proper parties to a bill which is to be brought by one of the parties to the contract against the other party to the contract. I think the authorities are uniform on this subject. They are so far as I have examined. At first it struck me there might be some conflict between this which seemed to be laid down as a general rule and the general rule in equity that all the parties in the subject matter

of a suit must be before the Court. But, instead of that, your honors, this exception (if it be an exception) to that general rule is founded in substantial right. Specific performance is in equity what damages are at law. A suit to enforce it is to be brought by the parties who would bring the action to recover damages at law. But the great reason why other parties cannot be brought in, is that neither of the parties must be compelled to enter into any questions or litigation with any person else than the parties by whom the contract was made. Now apply that here. If we had joined Henry A. Willard as a party here, would not the defendant have had a right to say that he was not to be mixed up in any transaction of Henry A. Willard's. Now, I suppose, that a party has a right in some form to try all his rights. Suppose, for instance, that Joseph C. Willard denies there is any such valid conveyance as is claimed from him to Henry, has not he a right in some form to try that? Suppose he brings a bill in his own name and in the name of Henry, a joint bill, and sets up that at such a time he conveyed to Henry, and asks a decree against the defendant, Tayloe, that he shall convey to them both, and the Court make a decree accordingly. How is Joseph C. Willard ever permitted after that to contest the claim of Henry A. Willard? Can he call Henry into a Court of Equity or Law and say "Convey to me;" say that "the conveyance I set up in my bill, and upon which the decree was made to us jointly, was invalid and illegal, for which reasons I am not bound by it. Now, I call upon you to deed to me." But, suppose, instead of making Henry an orator with him, he makes him a defendant; sets up this contract with Tayloe, and calls him into Court and asks a decree of specific performance against him, and also makes Henry a defendant, and says, "I conveyed to you, at a certain time, and want that rescinded; there is some reason for which that deed is invalid," would not Mr. Tayloe say, "I am not to be mixed up in this transaction. I contracted with you, not with Henry. You may settle the suit between yourselves. I am not to be made a party to it."

So it seems there is a substantial reason for all these decisions and this rule of law laid down in all the books that I have been able to find, (and gentlemen on the other side have not produced anything to the contrary,) that suits for specific performance are to be between the parties to the contract itself.

Suppose we stand upon the general rule of law. I agree that the books on chancery pleading ordinarily lay down the rule that all parties who are interested in the subject-matter of the litigation before the Court must be brought in. But the Courts always say: Although there may be a party who has some interest in the matter, if the Court can do complete justice between the parties before the Court and do no injustice to any party who is not before the Court, but has an interest, they never turn a case out of Court on account of the absence of such a party.

What do we ask? That Mr. Tayloe shall fulfil his contract and have his security as we agreed to give it. That does complete justice to the parties before the Court. If Henry A. Willard has any rights against Joseph C. Willard, by virtue of any conveyance made to him by Joseph, he has the full benefit of that in any suit he may bring against Joseph C. Willard. He is not cut off from any right he may have against his brother in consequence of any decree that may be made between these parties here. And that would be precisely the case of Van Horne *vs.* Crain, in 1 Paige.

We claim, therefore, that the non-participation of Henry C. Willard in completing the contract, and non-joinder as a party, furnish no reason against a decree in our favor. And this letter that was put in, and what the defendant sets up in his answer, in relation to Henry A. Willard will satisfy the Court that there are reasons why Henry A. Willard ought not to be made a party, that there is a question between him and Joseph C. Willard, which will have to be litigated some time, provided he sees fit to ask for any portion of the benefit of this decree.

I desire to call your honors' attention for a moment to one other subject, and then I shall have done; and that is, the matter alluded to by the gentleman in the close. The defendant in his testimony says that when this lease was executed, he objected to this sale clause, and that the orator told him if he wished, that should all go for nothing. And that is relied upon, and was argued at length by the last counsel for the defendant. Now, we say there are several very excellent answers to this suggestion. In the first place, nothing of the kind was set up in the defendant's answer; no allusion whatever in the defendant's answer to anything of this sort; and it is a rule well settled in equity, as in law, that the decision, the judgment, must be according to the allegations. Nothing in the answer; that is reason enough. In the next place, it is not proved in point of fact. The defendant swears to it in his testimony; the orator in his testimony as distinctly denies it. Those are the only two witnesses on the subject. But the orator in his testimony on this subject says that in this sale clause, he did not know what the amount of the ground rent was, and that was left blank, and he swears in his testimony that the contract was perfected by the defendant with his own hand, filling in this very clause. The defendant does not deny it. The original papers, if produced here, would show that very clause was substantially put in by the defendant himself, or a portion of it, in his own hand. More than that, this sale clause is in accordance with what seemed to be the wish and understanding of the Willards all along. This property connects with the hotel property. There are peculiar advantages to them over anybody else.

But there is still another reason, your honors, better than any I have given. The evidence of the defendant as to this is not admissible at all. The rule that when parties reduce their contracts to writing, the parole conversation between them all goes for nothing, is just as binding in a court of equity as in a court of law. It has been settled that where a party is called into Court upon a writing or agreement for a specific performance, he may excuse himself from a decree

for specific performance by proving there was a mistake or fraud in the written contract; but that a party can come into Court, when it is shown that he understandingly, knowingly put his name to a written contract, understanding precisely what there was in it, and excuse himself from the performance of it on the ground that the other party agreed at the time it should not be binding, is going further than any court of equity has ever gone or even will go.

So we say, that for these three reasons this portion of the defendant's case should go for nothing.

But I ought to allude to that whole correspondence in 1860–'61. It seems that at some time this honest Mr. Tayloe got a better offer, he says, for these premises than that contract with Mr. Willard; and that he wanted to accept it, and applied to Mr. Willard to be released from the contract. He wrote to him and got his wife to write to him. Well, what did Mr. Willard say? He says: "I stand upon the lease; I made my contract in writing." It is said on the other side that in the letter to Mr. Tayloe he did not explain; but in the letter to Mrs. Tayloe he does go into a full explanation. And when written to next day by Mr. Tayloe, he said all that was necessary for him to say: "I stand on the lease. I wrote to your wife, Mrs. Tayloe, a full explanation of this transaction, and I stand on the lease." It was a mere shuffle to endeavor to cheat Mr. Willard out of his contract at that time, and not succeeding it never was mentioned again; was not mentioned by the defendant the time the money and deeds were sent to him. It was not until he appeared before the master he happened to think to swear that Mr. Willard agreed at the time the contract was made and he signed it, it should all go for nothing.

In relation to the value of the premises spoken of, there is no direct evidence now that the value of the premises was any more than in 1854. Mr. Willard swears, as I said, it was worth $15,000. Then there is nothing to prove that it was worth any more in 1864, except the evidence shows they are getting a larger rent for it now. In relation to this, I under-

took to correct the gentleman, and I was myself wrong. On page 37 of the record we find that Mr. Willard testified that in 1864 the whole rent of the property might have been $3,000. At the time he testified, in February, 1865, he says it yielded him about $600 per month. This is no criterion as to the fixed value of the property, as it is mostly temporary.

I beg your honor's pardon for the desultory manner in which I have discussed this case, and thank you for the patience with which you have heard me.

Supreme Court of the United States.

December Term, 1867.

JOSEPH C. WILLARD

vs.

BENJAMIN O. TAYLOE.

BRIEF FOR THE COMPLAINANT.

BOSTON:
ALFRED MUDGE & SON, LAW PRINTERS, 34 SCHOOL STREET.
1868.

Supreme Court of the United States.

December Term, 1867.

JOSEPH C. WILLARD

vs.

BENJAMIN O. TAYLOE.

BRIEF FOR THE COMPLAINANT.

This is a bill for the specific performance of a contract to convey that real estate in the City of Washington, known as the "Mansion House," fronting on Pennsylvania Avenue, and in immediate connection with what is generally known as "Willard's Hotel."

In the month of May, 1853, the complainant and his brother, Henry A. Willard, purchased of the respondent and W. H. Tayloe, the "Willard Hotel" property. At this time the importance of the "Mansion House" property to the complainant, from its proximity to, and connection with the Willard Hotel property, was understood and recognized by the respondent as well as by the complainant, and the respondent then engaged not to sell it to any one for a hotel to be built on it, for ten years, and that Messrs. Willard should have the refusal of it at $22,500. (pp. 27, 46.)

On the twelfth day of April, 1855, the respondent leased to the complainant the "Mansion House" for ten years, from the first day of May, 1855, at a yearly rent of $1,200. The buildings were very much dilapidated and the estate was then under lease at a rent of $700 a year. (p. 23.)

The lease to the complainant contained the following covenant:

"It is hereby also agreed that the said Joseph C. Willard, his executors or assigns, shall have the right or option to purchase the above-described lot or piece of ground, together with all the buildings and improvements thereon, at at any time before expiration of the lease aforesaid, on paying, or securing to be paid for the same, the sum of twenty-two thousand five hundred dollars, payable as follows, two thousand thereof in cash, and two thousand, together with the interest on all the deferred instalments, in each and every year thereafter, till the whole is paid; the deferred payments to be secured by a deed of trust on the property. And a good warranty deed is to be given to the said Willard, his heirs or assigns, except only as to the yearly ground, rent of three hundred and ninety —— dollars, now existing against the said property, and subject to which, it is understood the said deed is to be made. And the said Joseph C. Willard doth hereby covenant and agree to and with the said Benjamin O. Tayloe, that he will pay the rent aforesaid when and as the same shall fall due; that he will keep the said premises in good and reasonable repair, and should he not think proper to avail himself of the privilege of purchasing, hereinbefore stipulated for, that at the expiration of the said term he will surrender the said premises to the said Benjamin O. Tayloe, his heirs or assigns, in as good condition as they are now in, reasonable wear and tear and accidents only excepted.

"And it is mutually agreed between the said parties that the said Willard is to have the right to put, erect, and build any houses, tenements, or other structures he may think proper, upon the said premises, during the lease aforesaid, and in order to do so to advantage, may pull down and remove the buildings now upon the ground, and make use of the materials thereof in the construction of the new improvements."

It will be observed that the sum of $22,500 is the same as

had been agreed on as part of the arrangements for the purchase of the Willard Hotel property. The complainant has testified that the market value of the property when he took the lease was under $15,000 (p. 28), and neither the respondent nor any one else has expressed a different opinion. The Messrs. Willard proceeded to expend very large sums of money on the Willard Hotel property (p. 28, fol. 63), and thus enhanced the value of the Mansion House property (p. 28, fol. 64), and this property was of special value and importance to the complainant, beyond its general market value, for reasons given. (p. 26, fol. 60.)

On the 15th day of April, 1864, fifteen days before the expiration of the time allowed for his election to purchase — the complainant addressed to the respondent the following letter:

WASHINGTON CITY, D. C., *April 15th*, 1864.

MY DEAR MR. TAYLOE: Enclosed please find check $2,000 on Bank of America, in New York, am't due (on account purchase Mansion House property) on May 1st, 1864 together with receipt for same, which please sign and return by bearer. If agreeable to you, I will have the deed and deed of trust prepared between this and the first day of May.

Very respectfully, your ob't serv't,

J. C. WILLARD.

To this the respondent made answer as follows:

WAS., *15th April*, 1864.

DEAR SIR: Mrs. Tayloe is waiting for me to go out with her; I have no time now to look into the business, and return the check enclosed; I wish to see you for explanations before closing the matter.

BENJ. OGLE TAYLOE.

These exhibits are proved. (p. 23, fol. 54.)

The next morning the complainant called on the respondent; informed him that he had the $2,000 for the cash payment for the Mansion House, and offered it to him. He refused it, saying that he would not accept greenbacks, — he understood the purchase money was to be paid in gold. That he would receive the gold and give a receipt. (pp. 23, 24, 31.)

In substance, the respondent admits this. (p. 65, cross-ints. 26, 27.)

The complainant then had prepared a deed of conveyance to himself and a deed of trust to secure the deferred payments, and sent them by one Ward to the respondent, who returned them with a letter. (Ex. 4, p. 47.) Between the 16th and the 29th of April, the complainant made repeated efforts to obtain a conveyance from the respondent, which are detailed in the bill, and not denied in the answer, and in support of these allegations in the bill, the proofs will be found on p. 20, 21, Hazard; 22 Kennedy; 24, 25, 26, Willard.

On the 29th of April, the day before the expiration of the time allowed for the purchase, the complainant filed the bill by which this suit was commenced.

I. Where a contract for the conveyance of lands, is in its nature and circumstances unobjectionable, it is as much a matter of course, for a Court of Equity to decree its specific performance, as it is for a Court of Law to give damages for its breach.

2 Story's Eq. § 751, and cased cited.

II. When the complainant, within the prescribed time, notified to the respondent his election to purchase, the contract became complete. The covenant in the lease was a *continuing offer* to sell on the terms therein mentioned; and as soon as that offer was accepted, there arose a complete and concluded agreement.

Boston and Me. R. R. *vs.* Bartlett, 3 Cush. 224.

Welchman *vs.* Spinks, 5 Law Times (N. S.), 385.

Such acceptance might be by parol.

Bos. & M. R. R. *vs.* Bartlett, 3 Cush. 224.
Warner *vs.* Willington, 3 Drew, 523.

But here the acceptance was in writing, (p. 45, Ex. I.) and the respondent might have at once filed his bill against the complainant to compel specific performance, or brought an action at law.

Old Colony Railroad *vs.* Evans, 6 Gray, 25.

The money payable by Willard to Tayloe, became a debt, as soon as Willard had signified to Tayloe his option to make the purchase. An action of debt or assumpsit could have been maintained by Tayloe for the recovery of the first instalment, and so as to all the others as they might become payable; or a bill in equity to recover the first instalment and compel Willard to execute the deed of trust securing the other instalments.

III. The tender of treasury notes was sufficient.

The contract was made in the District of Columbia; was to be there performed; and respected real property in Washington.

(1.) Within this District Congress had power to exercise exclusive legislation in all cases whatsoever.

Art. 1, sec. 8, chap. 17.

These terms unquestionably include the power to make treasury notes legal tender for all debts.

The Constitution itself, (Art. 1, sec. 10, chap. 1,) recognizes the fact that such a law is within the scope of legislative power.

Common practice in the States before the adoption of the Constitution is sufficient to settle this question.

The extent of these terms of the Constitution "according to the common understanding of mankind" (the test applied to them in Loughboro' *vs.* Blake, 5 Wheaton, 324), leaves no doubt of the power of Congress to make such a law. Every where, it has belonged to general and unrestricted legislative power to determine what is lawful money.

This is sufficient for the present case. The law may be inoperative outside of the District, because Congress had not power to enact such a law to operate within the States; but must operate on and govern all cases as to which there was power to enact it. And there was power to enact it and make it operative in all cases arising under, to be determined exclusively by, the laws of the District of Columbia.

(2.) It is submitted Congress had power to make this law operative within and throughout the entire territory of the United States.

Congress has power to borrow money on the credit of the United States. (Art. 1, sec. 8, ch. 2.) Also to make all laws which shall be necessary and proper for carrying into execution, this power to borrow money on the credit of the United States. (Art. 1, sec. 8, ch. 18.)

The issue of treasury notes to pay existing debts and others to be contracted, comes within the power to borrow money.

a. The power to borrow money necessarily carries with it the power to issue *securities* evidencing the debt; and such securities are recognized by the constitution itself. (Art. 2, sec. 8, ch. 6.)

b. The form of the security, whether payable to bearer or otherwise; the incidents of the promise, whether with or without interest; the manner in which the Government receives their value, whether in money, or in supplies or services, or the extinguishment of its existing engagements, — all these touch only *the mode* of exercising the power.

c. So the question whether such notes shall be receivable by the Government in payment for any and what public dues, is *modal* only; and belongs to the discretion of Congress.

A schedule of acts of Congress appended to this brief, the validity of which is believed never to have been questioned, shows that the above positions have been understood to be correct. In Thorndike *vs.* the U. S. (2 Mason's R. 1), one of these acts was interpreted and applied. Nowhere has the validity of any one of them been questioned.

The result is, that under the power to borrow money, Congress may issue treasury notes, payable to bearer, without interest and make them receivable for public dues; and such notes are not only capable of passing from hand to hand as currency, but from their form and nature are certain thus to be used.

In Mr. Madison's Message to Congress in Dec. 1815, there is a distinct suggestion in favor of the creation of such a common medium of circulation.

The great question is whether Congress has power to attach to these notes the quality of lawful money; so that by force of law, they shall be receivable and payable for private dues.

(1.) The annexation to these notes of the quality of lawful money *may* have been enacted by Congress to attain either one of two objects.

1. To create a medium of circulation among the people of the United States deemed by Congress preferable to the medium theretofore sanctioned by law, — or

2. Because it was deemed by Congress necessary to enable it to exercise its constitutional power to borrow money.

If the last hypothesis *may* be true, this Court is bound to assume that it is true. It can have no judicial knowledge of the actual motives which caused an act of Congress, unless those motives are declared in the act itself. But, if an act of Congress is valid, provided it was passed as a means to a particular end,

and there is nothing on the face of the act or in the nature of the case, showing it was not passed as a means to that end, the judicial result is that the act was passed as a means to that end.

The argument is reduced to these positions, each of which is submitted as sound.

That Congress having power to borrow money, the choice of means is with Congress, with but two general limitations.

1st. That the means chosen by Congress should be appropriate and conducive to the end.

McCulloch *vs.* State of Maryland, 4 Whea. 413.

2d. That the means chosen by Congress are not prohibited by any express provision of the Constitution, nor by any just deduction or implication from its provisions.

As to the first. That, speaking generally, and subject to the qualifications stated, the choice of means to execute a granted power is with Congress, does not admit of doubt.

United States *vs.* Fisher, 2 Cranch.

"Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of the power granted by the Constitution." Marshall, C. J.

A judicial question may in any case be raised, as to the connection between the means adopted by Congress and the granted power which it has undertaken to execute by those means.

That judicial question is, whether this Court can declare, that the means chosen by Congress could have no fit connection with the execution of the granted power to borrow money, when viewed as the means to be used by the Government of the United States for the attainment of that legitimate governmental end.

This Court cannot declare that attaching to treasury notes the quality of lawful money had not a direct and appropriate connection with borrowing money on those notes by the Government of the United States.

The real stress of the argument is on the second inquiry, whether the means chosen by Congress are prohibited by any express provision of the Constitution, or by any just deduction, or implication from its provisions.

First. No *express* prohibition, directly applicable to the inquiry, is relied on. The implied restrictions are drawn from sources, each one of which requires careful attention.

1st. It is asserted that giving to treasury notes the quality of lawful money, impairs the obligation of contracts.

To this there are sufficient answers. The first is that the obligation of a contract, in the sense in which those words are used, not only in the Constitution of the United States, but in the jurisprudence from which the framers of our Constitution borrowed them, is *that duty of performing it which is recognized and enforced by law.*

Curran *vs.* Arkansas, 15 How. 319.
Maine's Ancient Law, 313.

It has been adjudged both in this Court and in England and elsewhere, that a tender in what was lawful money at the time the tender was made, is a sufficient tender, though its actual value is not the same as that of the lawful money in use when the contract was made.

Farr *vs.* Masteller, 2 Cranch, 20.
U. S. *vs.* Robertson, 5 Pet. 644.
Gilbert *vs.* Brett, Davies' R. 48.
Donnman *vs.* Donnman's Ex'rs. 1 Wash. Virginia R. 29.
Bacon's Ab. Tender B. 2.

And it is not consistent with the fact to assert that the *obligation* of the contract is affected, because the law-making power has enabled the debtor to pay his debt in money of less intrinsic value than the currency of the date of the contract.

When a tender is made, of what the law deems money, the *obligation* of the contract is not affected. This distinction is recognized by the Constitution. It does not stop with a prohibition on the States to pass laws affecting the obligation of a contract; it prohibits them from making anything but gold or silver coin a tender in payment of debts. It is true the first of these prohibitions might have restrained the States from so legislating as to legalize tenders of depreciated currency for debts previously contracted. That is, they could not substantially alter the law so as to impair the legal remedy for existing contracts. But when this express restriction comes to be applied to the acts of Congress now in question, it proves to have no force or application to any contracts made after the dates of the laws, and has no power or efficacy whatever, unless it can be found in or deduced from the Constitution as a special restriction on the powers of Congress of the same limited character as the corresponding restriction on the powers of the States. And the practical result of this supposed restriction would be, Congress may not make treasury notes lawful money *for the payment of debts contracted before the passage of the law.*

It is submitted that it is not an implication from the Constitution, that Congress, even in this restricted sense, cannot pass laws to attach to treasury notes the quality of lawful money.

In Pennsylvania *vs.* Wheeling Bridge, 13 How. 518, this Court held the bridge to be a violation of the compact between Virginia and Kentucky, but an act of Congress, passed under its power to regulate commerce, legalized the bridge; and the act was yielded to as Constitutional.

The reasoning by which the power to impair the obligation of contracts, in the sense in which it is denied to the States, is

also denied to Congress, is theoretical, and rests on no sufficient foundations.

But the main argument against the power is, that to make paper money a legal tender *is a distinct and substantive power, and has not been conferred on Congress.*

This argument will be found to turn mainly on considerations already adverted to.

If making the notes, by which the Government was impowered to borrow money, receivable in payment of all public and private dues was an appropriate means of borrowing money, directly conducive to that end, then making them so receivable was certainly not a distinct and separate power. It was a power over what was incidental to and closely connected with the granted power to borrow money. That it is a substantive power, and one of great practical importance, is true. So is the power to lay a permanent embargo on all the foreign commerce of the country a substantive power; but it is held to be incidental to the power to regulate commerce.

The power to legislate for the punishment of crimes within the States, which interrupt or endanger foreign commerce; the power to make penal laws for the protection of persons and property on the high seas, or among our own citizens in China, are substantive powers of great magnitude; but as they are directly connected with the power to regulate commerce, they are held to be proper incidents of that power.

Congress has an express power to define and punish offences against the laws of nations; but in recent times no one has supposed that this express grant limited the incidental powers of Congress to define and punish other offences. Why should the express grant of power to coin money and regulate the

value thereof, limit the incidental power to use necessary means to borrow money. In accordance with these views have been the decisions of the numerous State courts, some of which are —

Metropolitan Bank *vs.* Van Dyck, 27 N. Y. 400.
Thayer *vs.* Hodges, 23 Inda. R. 144.
Van Hausan *vs.* Handiere, 13 Mich. 303.
Appel *vs.* Waltman, 38 Miss.

IV. The parties disagreed as to the right of the respondent to demand such a sum in treasury notes as would purchase $2,000 in gold. Whatever may be the ultimate decision of this Court concerning this right, it was not unreasonable for the complainant to believe that he might lawfully tender treasury notes; and having done so, and finding that they were refused, he filed this bill before the expiration of the time allowed for the purchase; and having truly stated therein what he had offered to do, and the dispute between himself and the respondent, he goes on expressly to offer "to perform the agreement on his part *according to the true intent and meaning thereof.*"

Promptly and fully he placed the subject of dispute before the Court, submitted the question to its determination, and offered to do whatever a Court of Equity should say he ought to do on his part; and if the Court should now be of opinion that the pretension of the respondent was well founded, though this will modify the decree, it will not be a bar to specific performance.

Chesterman *v.* Masser, 9 Hare, 206, was a bill by a lessee for the specific performance of an agreement to renew a lease, at the option of the lessee. The parties had differed about their respective proportions of a fine to be paid to the superior landlord, and the complainant had failed during three years to pay any part, on the ground that too much was demanded.

The Court said:

"It has been very strongly urged by Mr. *Selwyn*, that there was an improper amount of fine charged upon the plaintiff. If

he so thought, he should have then come into a Court of Equity for the specific performance of the covenant, and put himself in the power of the Court, so as to enable the Court to compel him to pay a reasonable sum. If the plaintiff has the equity which he asserts, and that without applying to a Court of Equity to assess the amount of the fine, he might hold that equity not only for the three years for which it has been attempted to be held, but, for aught I can see, for twenty years longer, or an indefinite time, by simply saying, 'You have imposed an unreasonable fine upon me; I will not submit myself to the jurisdiction of a Court of Equity to ascertain the proper amount of the fine I ought to pay, and you have no means of resorting to a Court of Equity.'"

In the case at bar, the complainant took promptly and fully the course which the Court thus declared to be proper. No imputation of any laches is possible. It was not a want of good faith to believe that these Acts of Congress, on which the Government and the citizens were constantly acting, and which have been held valid by every Court which has passed on them, were operative in his case. But he found himself confronted with a question raised by the respondent, and he filed his bill to have that question settled, offering to do whatever a Court of Equity should require.

In Secomb *vs.* Steele, 20 How. 103–105, the principles on which a Court of Equity acts in such cases are fully stated.

See also Mass. *vs.* Barton Law R. 1 Eq. 474.

No one of the defences set up by the answer is tenable.

I. A change in the value of the property is relied on.

It is clearly settled that if the contract was fair, and not grossly unequal *when made*, each party took the risk of subse-

quent events, and supposed hardship arising out of them cannot be regarded.

Webb *vs.* London & P. R. R. Co. 9 Hare, 129.
Lawder *vs.* Blatchford, Beat. 522.
Low *vs.* Treadwell, 3 Fairfield, 441.
Fry on Specific Per. [107–116.]

It plainly appears that when this contract was made, both the rent reserved and the sum stipulated to be paid ($22,500), very largely exceeded the market value. The only rational conclusion is that this excess was attributable to, and was the price of the option.

II. The defence, that the covenant was obtained by some parol assurance that it would not be enforced is not set up in the answer, and is wholly inconsistent with prominent and admitted facts.

III. The fact, that the draft of a trust deed sent by the complainant to the respondent did not conform to the contract, can have no legal bearing on the case.

(1.) It was no part of Mr. W's duty to have a trust deed prepared. This was a thing to be done by Mr. Tayloe when he should be ready to convey. Ward's dep. p. 44.

(2.) The parties never got so far as to differ about the form of the trust deed, and Mr. Tayloe returned it with the deed of conveyance, without objection. (Ex. 4, p. 47.)

(3.) The delivery of the deed of conveyance and of the deed of trust were to be concurrent acts, and an omission to make a tender of the latter could, under no circumstances, affect the complainant's rights, so long as the respondent persisted in his refusal to convey.

Rutherford *vs.* Haven. 11 Iowa, 587.

IV. Henry A. Willard was not a proper, still less, a necessary party to the bill.

(1.) The alleged deed of assignment by the complainant to H. A. Willard, which is relied on by the respondent in his answer, is not put in evidence on the record, nor in any manner proved as against the complainant.

The lessee may assign his whole interest, or he may underlet the whole or part of the land. But he can not assign an undivided moiety of his interest, so as to create any privity between the lessor and the assignee.

However it might operate between the parties, there was no privity of contract or estate between H. A. Willard & Taylor.

(2.) Only the parties to the contract are proper parties to the bill; and a sub-purchaser of an undivided interest in the contract is not a necessary party.

Mandeville *vs.* Welch, 5 Whea. 277.
Tasker *vs.* Small, 3 M. & Cr. 63.
Humfries *vs.* Hollis, Jacob's R. 73.
Cuts *vs.* Thodey, 13 Sim. 206.
S. C. on appeal, 1 Coll. C. C. 223.
——— *vs.* Walford, 4 Rus. 372.
Long *vs.* Bowering, 10 Jur. (N. S.) 668.
Wood et al. *vs.* White, 4 M. & Cr. 460–483.
Chadwick *vs.* Waden, 9 Hare, 188, S. C. 12 Law & Eq. 180.

V. The objection on which the Court below dismissed the bill, that H. A. Willard is a necessary party to the deed of trust, is merely futile.

(1.) There is no evidence in the record to support it.

(2.) If the estate should be conveyed to the complainant in accordance with the contract, he alone can reconvey it in trust, and the respondent has nothing to do with any equities existing between the complainant and H. A. Willard.

See cases last cited.

(3.) The whole subject of how the trust deed should be executed, belongs to the master, after the Court shall have decreed specific performance.

See Paine *vs.* Hutchinson, Law Rep. (Equity,) Vol. 3, p. 257.

(4.) H. A. Willard was before the Court by his petition and the Court could have directed him to join in a conveyance, if it had been necessary; which plainly it was not.

B. R. CURTIS,
Of Counsel with Complainant.

SCHEDULE.

ACTS OF CONGRESS AUTHORIZING THE ISSUE OF TREASURY NOTES.

Vol.	II.	Statutes	at	large,	page	801,	Approved	Feb. 25, 1813.
"	III.	"	"	"	100,	"	March	4, 1814.
"	"	"	"	"	161,	"	Dec.	26, 1814.
"	"	"	"	"	213,	"	Feb.	24, 1815.
"	V.	"	"	"	201,	"	Oct.	12, 1837.
"	"	"	"	"	228,	"	May	21, 1838.
"	"	"	"	"	323,	"	March	2, 1839.
"	"	"	"	"	370,	"	March	31, 1840.
"	"	"	"	"	411,	"	Feb.	15, 1841.
"	"	"	"	"	469,	"	Jan.	31, 1842.
"	"	"	"	"	474,	"	April	15, 1842.
"	"	"	"	"	581,	"	Aug.	31, 1842.
"	"	"	"	"	614,	"	March	3, 1843.
"	IX.	"	"	"	40,	"	July	22, 1846.
"	"	"	"	"	64,	"	Aug.	6, 1846.
"	"	"	"	"	118,	"	Jan.	28, 1847.
"	XI.	"	"	"	257,	"	Dec.	23, 1857.
"	"	"	"	"	430,	"	March	3, 1859.

Mr. Justice Clifford

A LETTER

ON THE

Validity and Constitutionality

OF THE

LEGAL TENDER ACT.

BY

EFFINGHAM H. NICHOLS, ESQ.

A MEMBER OF THE NEW YORK BAR.

WASHINGTON:
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NOTE.

The following letter originated in a conversation which casually occurred between the writer and myself, a few days ago, on the CONSTITUTIONALITY of the LEGAL TENDER ACT. His views were so original, bold, terse, and logical, that I requested him to furnish them to me in writing; and he having kindly complied with that request, I now, with his permission, publish them.

I. N. MORRIS.

WASHINGTON, D. C., *January* 6, 1869.

HON. ISAAC N. MORRIS,

Quincy, Illinois:

DEAR SIR—I embrace this, my first leisure, to comply with your request, viz: to briefly state in writing the views which I casually stated to you in conversation a few evenings since in reference to the *validity* and *constitutionality* of the *legal-tender act.*

The Constitution of the United States provides *two* things: first, it *organizes the General Government*, and then *it clothes that Government with certain powers.*

It *organizes* the Executive, the Legislative, and the Judicial Departments, and then defines the *powers* of each.

What was thus organized, in the language of the preamble, was *ordained* and *established*, and was ordained and established by the *people;* for the language of the preamble is, "We, the *people* of the United States, in order to form a more perfect Union," &c., &c., "do *ordain and establish* this Constitution for the United States of America."

The moment *organization* was effected under the Constitution, there arose a *trust* between the Executive, the Legislative, and the Judicial Departments, on the one hand, and the people on the other, in which *trust* the former were *trustees* and the latter the *cestui que trust.* Out of this *trusteeship* certain obligations arose, the fundamental and primary one of which was the *obligation* and *duty* which rested upon the trustees to see to it that what the people had thus *or-*

dained and *established* should *continue* to be *ordained* and *established* through coming time; and herein arose the *power* and *duty* of *self-preservation*. In case a sudden emergency *should threaten the existence* of the Government, it would become the *duty* of the Executive to act with promptness, and of Congress to come to the rescue, and act with power commensurate with the emergency.

In the very *necessity* of the case, and the fulfilment of the *duty* and *obligation* which the people have placed upon the Government, and the Government have taken upon themselves, *there is implied* the right to exercise *all* or *any extraordinary powers* which are *necessary* and *adequate* to *self-preservation*. And it must, of necessity, follow that the Executive and Legislative must be the *judges*, for the time being, of the *magnitude* of the danger and the *power* necessary to meet it.

It was in the midst of *such* a danger that the *legal-tender act* had its origin. It provided for the issuing of legal tender notes, and required them to be taken in the payment of "all debts, public and private, except duties on imports and interest on the public debt." The power to issue necessarily carried with it the power to compel a circulation—otherwise the power to issue would have been valueless and the object sought unaccomplished. "Furnish me with money," said one, "and I will furnish you with the sinews of war." Having had its birth in the midst of an *adequate necessity*, the act is *valid*, and its validity is to be found in the very *ordaining* and *establishing* of the Constitution; and this validity does not arise, as Douglas is reported to have once said, out of "a necessity that rises higher than the Constitution," but out of a necessity that rises out of the very *foundation* of the Constitution itself. And the legal-tender act being valid in its *inception*, is valid in its continued existence.

There *are acts* which *necessity justifies*, but which, in the *absence* of that necessity, would *not* be justified.

These views *comport* with the body of the Constitution, and especially with the following clauses, which provide that Congress shall have power—

"To *provide* for the common defence and general welfare of the United States;"

"To borrow *money* on the *credit* of the United States;"

"To *provide* for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;"

"To make *all laws* which shall be *necessary and proper* for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

When the Government itself was threatened, how "necessary and proper" the power to protect it!

The President is required to make oath that he will to the best of his ability "*preserve, protect*, and *defend* the Constitution of the United States;" that is, not only that he will preserve, protect, and defend the *organic law*, but the *organization* itself. The very language implies that the President shall have the *means* and *power* to "preserve, protect, and defend." But all legislative power is vested in Congress, and they have power to make "all laws which shall be necessary for carrying into execution * all * powers vested by this Constitution in any *Department* or *Officer* thereof," and therefore have the power to pass laws to enable the President to "preserve, protect, and defend" that which the people did "*ordain and establish*."

By the tenth amendment to the Constitution, "the powers *not delegated* to the United States by the Constitution, *nor prohibited* by it to the States, *are reserved* to the States re-

spectively, or to the people." The power in question, under the circumstances, is primarily and necessarily among the "powers delegated to the United States." Even if it were not, it is *not* among the powers *not* prohibited to the States, for the reason that it is expressly provided that "no State shall * * * make anything but gold and silver coin a tender in payment of debts," and, therefore, by the letter of the text, it is *not* "reserved to the States respectively, or to the people." Furthermore, whatever powers are reserved to the States respectively, or to the people, it is *equally necessary* for the *people* as for the *Government* that the Government which the people did "ordain and establish" should be preserved.

The parties immediately interested in the cases involving the validity of this act, recently submitted to the Supreme Court of the United States, are lost in the overshadowing magnitude and public importance of the principle involved; and the mere fact that it is in the power of that tribunal to render an adverse decision, and thereby, in effect, close the doors of the National Treasury and spread bankruptcy throughout the nation, surrounds the learned and distinguished Chief Justice and his associates with almost unnatural interest.

With great respect, I have the honor to be,

Your obedient servant,

EFF'M. H. NICHOLS.